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THE
PRACTICE
OF
THE COURT OF CHANCERY
FOR ONTARIO.

Jun 5th

WITH
SOME OBSERVATIONS ON THE PLEADINGS
IN THAT COURT.

COMPILED BY
WILLIAM LEGGO,
OF OSGOODE HALL, BARRISTER-AT-LAW, LATE MASTER AT HAMILTON.

IN TWO VOLUMES.

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CHAPTER XXIX.

SECTION I.—*Proceedings in Mortgage Suits.*

The practice in a suit for redemption, foreclosure or sale varies so widely from that adopted in England, that we must depend for information chiefly on the orders and decisions of our own Court. But before proceeding to the practice in the Master's office, a brief notice of the general law relating to Mortgages will be necessary.

Redemption is an equitable process by which a mortgagor, or other person interested in real or personal property subject to a mortgage or incumbrance, may recover or get the absolute ownership thereof, upon certain terms; which are commonly the payment of the principal sum due, with interest thereon, and the costs of the mortgagee.

Foreclosure is (as to redemption) the converse, and generally the reciprocal¹ remedy, whereby the mortgagee, or other person entitled to the benefit of a mortgage or incumbrance, may acquire an absolute title to the incumbered property upon nonpayment, by the person entitled to redeem, of the amount secured thereon, including interest and costs. Wherever there is a right to foreclose, there must of necessity be a right to redeem, because foreclosure is in default of redemption; and every decree to foreclose limits a time within which the estate may be redeemed. And the non-exercise of this right to redeem is commonly,² but not necessarily, followed by foreclosure.

In certain cases in which foreclosure would be inequitable or inconvenient, or at the request of one or more of the parties interested, where the Court of Chancery thinks fit to exercise its statutory power,³ a sale of the estate and distribution of the proceeds will be decreed instead of foreclosure.

¹ *Longuet v. Scawen*, 1 Ves. 403.

² See *Stokes v. Ferrier*, 3 Sw. 685, per Lord Nottingham.

³ 15 & 16 Vict. c. 86, s. 48.

The right or equity of redemption has been described sometimes as an estate,¹ and sometimes as an interest,² or equitable right inherent³ in the land; and though strictly equitable, and capable of being enforced in equity alone, it is of so much consequence in the eye of the law, that the law takes notice of it, and makes it assignable and devisable.³ Like the estate itself, it passes by transfer and devise: may be impressed with, and then become subject to, the ordinary consequence of entails and other limitations: devolves, according to the tenure of the actual estate, upon the real or personal representatives of the owner: and is subject to gavelkind, borough English, and other customs which affect the ordinary legal ownership.⁴

The existence of a right of redemption does not necessarily depend upon any distinct agreement, but may be inferred from the nature of the transaction. It arises where property, or the evidence of property, have been transferred as a security for the payment of money, or have come to the hands of a person subject to a condition to the like effect; and where the nature of the transaction is doubtful, the intention of the parties may sometimes be shown by extrinsic evidence, or may be ascertained by a jury,⁵ under an issue directed by the Court of Chancery.

It will be observed, that the statutory right to order a sale of mortgaged premises is referred to. The powers conferred on the English Court by that statute are vested in our Court by sec. 10 of 22 Vic. c. 12,⁶ which enacts that it shall have "generally, the like jurisdiction and power as the Court of Chancery in England possessed on the 10th June, 1857, as a Court of Equity to administer justice in all cases in which there exists no adequate remedy at law." The Imperial Statute was passed in the session of 1852-3, and some of its provisions have been embodied in our Orders.

The simplest form of redeemable contract is the common legal mortgage, by which real or personal property is conveyed by the mortgagor to the mortgagee, as a pledge or security for the debt;

¹ *Casborne v. Scarfe*, 1 Atk. 803.

² *Lloyd v. Lander*, 5 Mad. 290.

³ Per Hale, C. B., in *Pawlett v. A. G.*, *Hardres*, 465, 469.

⁴ *Fawcett v. Lowther*, 2 Ves. 304; *Blake v. Foster*, 2 Ba. & Be. 387.

⁵ *Wynne v. Styant*, 2 Ph. 303.

⁶ Con. Stat. U. C. page 51.

the conveyance being absolute in form, but subject to a proviso, by which it is to become void, or by which the pledge is to be reconveyed, upon repayment to the grantee of the principal sum secured with interest on a certain day, which is usually fixed at the end of one year or less from the date of the security. Upon the nonperformance of this condition, the mortgagee's estate becomes absolute at law, but remains redeemable in equity during a period limited by statute, and under the rules imposed by Courts of Equity.

There are, besides, other forms of legal mortgage, now but little used, but to which it will be proper to refer. One of these is the Welsh mortgage, by which the estate is conveyed absolutely to the creditor, without condition; the rents and profits being enjoyed by him in lieu of interest. This kind of security differs greatly in its consequences, as well as in form, from the common mortgage; because it carries a right to redeem, but none to foreclose; for being without condition, there can be no forfeiture,¹ and it is after forfeiture that the mortgagor's right is barred by foreclosure.² The possession of the mortgagee is of the very essence of the Welsh mortgage, and every receipt of rent is a receipt, by virtue of the contract, of so much interest. Hence, a Welsh mortgage was held to be redeemable under the old law of limitation, until the lapse of twenty years from the time when the mortgage was fully satisfied;³ and in this particular, it seems that the modern Statute of Limitations (3 & 4 Will. 4, c. 27) has made no difference.

A form of security, called a Bristol bargain, is also noticed in the older Reports. In it, the bargain was for repayment of the debt and interest by instalments, at the rate of 20*l.* per annum for seven years for every 100*l.* advanced; up to which point it was allowed, the legal rate of interest being then 6*l.* per cent. But when it was attempted to increase the number of annual instalments to eight, it was declared that the agreement was against conscience, and that, if allowed, it might be carried on without

¹ *Baile v. Lord*, 2 Dru. & War. 480.

² *Bonham v. Newcomb*, 1 Vern. 232. This language does not seem quite correct, because an equitable mortgagee may often foreclose, though there be no actual forfeiture, and even no condition, (264, 265.) But this is by analogy; the equitable mortgagee being entitled to call for and to have the same remedy as if he had obtained a legal mortgage.

³ *Yates v. Hambly*, 2 Atk. 863; *Longuet v. Scawen*, 1 Ves. 403; *Fenwick v. Reed*, 1 Mer. 125.

stint or bounds ;¹ and redemption was decreed on the usual terms of paying principal and interest. And it was said by Sir John Trevor, M. R., that he thought the Court would relieve against an ordinary Bristol bargain, *viz.*, by the repayment by instalments for seven years.²

But since the repeal of the usury laws, it is probable that the courts would not interfere in such a matter, provided the transaction were not fraudulent.

The absence in a common mortgage of the covenant for payment of the debt, does not of itself affect the mortgage character of the transaction ; but it has been thought to be material where the instrument, not being a common mortgage, the absence of the covenant may be explanatory of the intention of the parties. Thus, in the case of a lease by the mortgagee to the mortgagor for a long term, at a rent, with a proviso for re-conveyance if the mortgage money and interest was paid within three years, the absence of a covenant for repayment of the mortgage money was held to shew that after the three years the interest was to be irredeemable, and that the intention was to purchase the interest absolutely by way of rent-charge ; and the transaction being fair, and different from an attempt to fetter the redemption in the land itself, was upheld.³ So a conveyance by a debtor to a trustee, the creditor being a party, in trust out of the annual proceeds to pay head rent and insurance premiums, and to pay creditors their principal and interest by instalments, and then to re-convey, and which contained no covenant for payment by the debtor was held⁴ not to be a mortgage entitling the creditors to foreclosure or sale ; though, if there had been such a covenant, the decision would probably have been otherwise.

And while the courts protect the *bona fide* purchaser against stale demands, or other pretence that only a mortgage was intended, they also take care that a borrower shall not suffer from the omission in a deed or agreement, of the usual requisites of a mortgage, if those requisites have been omitted by positive fraud,

¹ *James v. Oades*, 2 Vern. 482.

² *Fulthorpe v. Foster*, 1 Vern. 477.

³ *King v. King*, 3 P. Wms. 358 ; *Goodman v. Grieson*, 2 Ba. & Be. 278 ; *Mellor v. Lees*, 2 Atk. 494 ; *Floyer v. Lavinton*, 1 P. Wms. 268.

⁴ *Taylor v. Emerson*, 4 Dru. & War. 117.

by mistake or accident. Therefore, they hold that an instrument, which purports to be an absolute conveyance, may be controlled in its effect by another, which contains an express stipulation for redemption;¹ or refers to the property as being in mortgage; or contains an agreement for a further loan;² or by proof of payment of interest,³ or other proper evidence that the original contract was only made by way of security.

So, where the deed purported to be an absolute assignment, but there was an erasure of a proviso which remained partly legible, and the erasure was not accounted for: the House of Lords held⁴ that the instrument was a security, on the argument for the Crown that there was no proof of payment of the consideration, than which the value of the estate was at least four times greater; and that the grantor had continued in possession, had made leases, and exercised other acts of ownership; though, upon an issue the jury had found that the deed was duly executed, and though at first designed for a mortgage, had been afterwards altered to an absolute purchase. Again, if the deed contain a trust for sale on nonpayment of the consideration money by a day named, a redeemable interest is inferred to have passed,⁵ though there be no proviso for redemption, but only for re-conveyance on payment of the principal and interest.

It should, however, be observed, that the disproportion of value is not of itself a reason for construing an instrument as a mortgage, but only where there were other circumstances tending to the same conclusion;⁶ though, on the ground of excess of value, it was adjudged in an early case, that a release of an equity of redemption was made on a further trust, and did not bar the right of redemption.⁷

So, if a mortgage were intended, but the mortgagee omit to insert the proviso for redemption, the mortgagor being a marksman, or if the mortgage were intended to be made by way of absolute

¹ *Williams v. Owen*, 10 Sim. 386.

² *Sevier v. Greenway*, 19 Ves. 413.

³ *Allenby v. Dalton*, 5 L. J., Ch. 312.

⁴ *A. G. v. Crofts*, 4 Bro. P. C. 136.

⁵ *Bell v. Carter*, 17 Beav. 11: 17 Jur. 478.

⁶ See Lord Nottingham's judgment in *Thornborough v. Baker*, 3 Sw. 681. So in case of an annuity, *McGee v. Morgan*, cited 2 Sch. & Lef. 395, disproving of *Heathcote v. Paignon*, 2 Bro. C. C. 167.

⁷ *Morley v. Etwags*, Ca. & Ch. 107.

conveyance and defeasance, but the grantee never executed the latter, the grantor is allowed to shew the mistake.¹

But Courts of Equity will not lightly infer an intention to make a mortgage, where none is expressed, especially where possession has gone with the conveyance, and there has been a long acquiescence. Hence, a covenant by the grantor, not to make partition without the advice and consent of the grantee, has been held² not to turn a conditional sale into a mortgage.

A bill was filed against a trustee for an account and re-conveyance. At the hearing, a decree was drawn up by consent, treating the defendant in all respects as a mortgagee: *Held*, upon appeal from the Master's report, that, from the time of the decree, the rights of the parties respectively must be determined by the rules ordinarily applicable to cases of mortgage.³

A creditor brought an action against his debtor to recover his demand, which was stayed by an arrangement made in October, 1840:—the debtor assigned to the creditor the house and premises occupied by the debtor, when, in addition to the amount of the debt, a sum in cash was paid him, and for two years he continued to receive the rent of the premises, when the creditor obtained possession by an action of ejectment. In December, 1855, the debtor filed his bill setting up that the transaction was a mortgage, alleging that his poverty had in the meantime prevented him from enforcing his claim: the Court, though inclining to dismiss the bill, directed an issue as to the question of mortgage or no mortgage.⁴ The enquiry granted in this case would, at first sight, seem to admit evidence, and necessarily parol evidence on the question of "mortgage" or "no mortgage," but it will be seen that the enquiry was granted with great reluctance, and perhaps from an overtenderness to the plaintiff. The Master, under such a reference, would find *Holmes v. Matthews*,⁵ and *Greenshields v. Barnhart*,⁶ valuable guides.

1 3 Atk. 889; *Maxwell v. Mountacute*, Pro. Ch. 527; *Card v. Jaffray*, 2 Soh. & Lef. 374. This was formerly, and especially in the north, a common way of effecting mortgages; the two instruments being read as a single deed; *Cotterell v. Purchase*, For. 61; *Spurgeon v. Collier*, 1 Eden. 55.

2 *Cotterell v. Purchase*, For. 61.

3 *Kerby v. Kerby*, 5 Grant 687.

4 *Watson v. Munro*, 5 Grant 662.

5 3 Grant 379, and 6 Grant 1, in Appeal.

6 3 Grant 1, in Appeal.

A person having a claim against the owner of a mill brought an action against his executors and recovered judgment ; an execution against lands was sued out, and placed in the hands of the Sheriff, under which all the lands of the testator, of which the mill and mill premises formed a portion, were duly advertised for sale by the Sheriff. The testator, by his will, had devised his lands to his relations : the mill and mill premises to an infant on his obtaining twenty-one, his father, during his minority, being entitled thereto. By an arrangement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the Sheriff's sale, and bid such an amount for the whole property as would cover the execution debt and costs, and that he should hold the same for the several owners ; accordingly he attended the sale, and bid the stipulated amount, the proprietors and their agent also attending there and preventing any competition by openly announcing the arrangement which had been made, and only one bid was made for the property, which was duly conveyed by the Sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and mill premises, which the purchaser retained, occupied, and improved during the minority of the devisee, who, on obtaining his full age, demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out his arrangements. The Court, under the circumstances, *held*, the plaintiff entitled to redeem the mill premises, and that the arrangement under which the purchase was made at the Sheriff's sale was capable of being proved by parol evidence.¹ In *Rapson v. Hersee*,² the distinction between a mortgage and an absolute sale, with a contemporaneous agreement for repurchase, is fully explained ; and an absolute conveyance held to be of the latter character rather than the former, on the weight of evidence, which was conflicting.

Neither will Courts of Equity disturb the rules of evidence, by varying a deed only on parol proof that the intention was different from that which appears by the deed.³ There must be mistake,

¹ *McGill v. McGlashan*, 6 Grant 324.

² 16 Grant 685.

³ *Lord Portmore v. Morris*, 2 Bro. C. C. 229.

or fraud, or some like equity *dehors* the deed, upon proof of which the grantor will be relieved ; and it has been said that the evidence must be as satisfactory as if the deed were admitted.¹ In pursuance of this rule against the admission of mere parol evidence of intention, redemption has been refused² on an annuity deed, even where the grantee had acquiesced in the redemption ; although having died before the completion, his executors afterwards refused to receive the money.

A lessee of the Crown being in arrears for rent, assigned his interest to another, taking a bond to re-convey one-half thereof on payment of half the amount advanced within a year, which time having been allowed to elapse without payment of this sum, the assignee refused to convey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the Court held that under these circumstances the transaction was *prima facie* one of mortgage, and that the onus of proving it to be a sale devolved upon the party attributing that character to the transaction, which, having failed to do, a decree was made for redemption, with costs, except the costs of a redemption suit, which were reserved until after the Master's report.³

A mortgagee took a release of the equity of redemption, and thereupon an agreement was signed by both parties for the purchase of the property by the grantor for a sum exceeding the amount due on the mortgage, not giving the grantor a mere option to purchase, but binding him to buy and pay the stipulated price. *Held*, that the transaction was one of mortgage.⁴

An improvident bargain for the sale of the plaintiff's property, where the parties were very unequal as regards means, intelligence and otherwise, and the papers were drawn by the vendee, who omitted some important parts of the bargain, and the vendors had not the protection of competent independent advice, was held not to be binding on the vendors. On making an advance of money on the security of real estate, it is not competent for the lender to bargain for the purchase of the property at a specified sum in case

¹ *Lord Truham v. Child*, 1 Bro. C. C. 91.

² *Hare v. Shearwood*, 1 Ves. Jun. 241 ; 3 Bro. C. C. 168.

³ *Bostwick v. Phillips*, 6 Grant 427.

⁴ *Hawks v. Milliken*, 12 Grant, 286.

of default in repaying the advance at the time stipulated. The plaintiffs executed an absolute assignment of their interest in certain real estate, and the assignee gave his note for £500, which he alleged to be the consideration for such assignment, payable in two years, subject to a condition expressed in the note, that the maker might retain thereout any advances he should in the meantime make to the assignors; no change of possession within the two years was intended, and none took place; the assignee alleged that the transaction was a sale to him with a right to the assignors to repurchase by repaying any advances he should make within two years; but no evidence of this being given, the Court held that the transaction must be treated as a mortgage, and that the agreement for sale in case of default was therefore void.¹

One of the tests by which a conditional sale is distinguished from a mortgage is the adequacy of the consideration; where, therefore, it was shewn that the plaintiff had conveyed an estate for less than one-fourth its value, with a clause giving him a right of re-purchase, the conveyance was declared to be a security only.² A deed was made by one joint owner of property at the instance of the other joint owner, to a third person, under a parol agreement that the grantee should hold the property to secure a sum of money which it was intended that he should advance to pay interest on a mortgage which was on the property, and that subject thereto the grantee should hold the property in trust for the wife of such other joint owner, who remained in possession of the property: *Held*, that parol evidence to establish the agreement was admissible.³

A memorandum on the deed, signed by the mortgagee,⁴ is sufficient to set it up as a security; and so are written accounts of the receipt and payment of interest, kept by the grantee under an absolute conveyance, there being also parol evidence to explain the omission of the usual requisites of a mortgage.⁵

1 *Fallon v. Keenan*, 12 Grant 388.

2 *Stewart v. Horton*, 2 Grant 45.

3 *Campbell v. Durbin*, 17 Grant 80 and see *McLeod v. Orton*, 17 Grant 84; *Denny v. Lithgow*, 16 Grant 619; *Ross v. Ross*, 6 Grant 647; *Williams v. Jenkins*, 18 Grant 536.

4 *Franklyn v. Ferne*, Barn. Ch. 30. The report states that it was the mortgagor's signature, but this is a misprint, or the memorandum was signed by both parties. On the question of costs, the report proceeds thus:—"Now as to that the judge was pleased to say that he thought it would be going too far to make Josiah (the mortgagee) pay the costs of this suit; but, on the other hand, his opinion was, that Josiah had forfeited his costs. In the first place here is an indorsement under his own hand, whereby he has admitted the assignment to be a mortgage; and, in the next place, here is a witness falsifying his answer."

5 *Cripps v. Jos*, 4 Bro. C. C. 471.

The memorandum may also be signed so as to bind the grantee or transferee, by his agent, if the agent's authority can be proved by, or inferred from, sufficient evidence. Thus, the authority of the wife of a transferee, who had signed an indorsement on the bill of sale of a ship, declaring it to be a mortgage, was admitted, and the signature was held to be the mortgagee's act,¹ upon evidence that the mortgagee himself had given a receipt for interest on the consideration money.

Where a *feme covert* granted an irredeemable annuity, out of her separate life interest in a fund, she was held entitled to redeem on the ground that there was an intention, though none was expressed, against anticipation; and that though she might have raised a loan, it was too large an anticipation to do it by way of annuity.²

It is not a consequence of this readiness in courts of equity to construe certain absolute conveyances as mortgages, that there can be no sale with a proviso for repurchase, limited to be void upon the nonperformance of a certain condition, it being clear that if an absolute sale be really intended, an agreement made at the same time for a repurchase, and not acted upon, will not of itself entitle the grantor to redeem.³ The question to be considered is, whether the contract was in its nature a mortgage under the form of a sale or a bona fide purchase, subject to a contract for repurchase.⁴ and the test of this is the reciprocity and mutuality of the remedies.⁵ For as on the one hand, where the grantee has the usual remedies of a mortgagee, the deed may be inferred to be only a security, so on the other, in the entire absence of those remedies (assuming that there was no fraud or mistake) no new clause for repurchase will confer upon the grantor a right to redeem after the condition has been broken.

Now, the condition for repurchase, unlike the proviso for redemption, is construed strictly against the grantor; who, if he desire the benefit of it, must shew compliance with its terms.⁶ And the reason of the difference is, that in a mortgage the penalty

¹ *Whitfield v. Parfitt*, 15 Jur. 862.

² *Coverley v. Dudley*, 3 Atk. 541.

³ See *Verner v. Winstanley*, 2 Sch. & Lef. 394, and the instances cited below.

⁴ *Mellor v. Lees*, 2 Atk. 495.

⁵ *Goodman v. Grierson*, 2 Ba. & Be. 274.

⁶ See 3 Sw. 631; *Pegg v. Wieden*, 16 Beav. 239; *Barrell v. Sabins*, 1 Vern. 208.

or forfeiture is introduced for the purpose of security only; and the mortgagee is compensated by receiving interest in default of payment of the principal at the time appointed. But in the case of a defeasible purchase, forfeiture is out of the question (the estate being absolutely vested in the grantee by the conveyance); and the power to repurchase not being a right arising out of the nature of the contract, but a privilege given by special agreement, is to be exercised only on strict performance of the terms of the deed.

Therefore, where in one case it was agreed at the time of the conveyance,¹ that the premises should be reconveyed by the purchaser on payment of the original consideration money, and the expenses of the conveyance, within a limited time; and in another,² after an absolute release of the equity of redemption to the mortgagee for a further sum, the mortgagee (being then in the position of a purchaser) demised the estate to the former mortgagor for a term, at a rent, and agreed at the same time that, upon punctual payment of the rent, the estate might be repurchased at a fixed price, and within a certain time; but in default of payment of the rent, the agreement was to be void—it being clear in these cases that there was no mutuality; in other words, that the purchasers had no means of compelling the repayment of their consideration moneys, but that the power of repurchase was a privilege only—redemption was refused in the first case after the period fixed had passed, and repurchase in the other within the period, but upon default of payment of the rent, though the arrears due were tendered with the purchase money. The Court came to a like decision³ in another case, in which, upon a release of the equity of redemption for valuable consideration, a memorandum was given to the mortgagor, that the mortgagee would reconvey upon repayment to him within a year of the original mortgage money, with the consideration for the release and the charges for repairs. And if the mortgagee agree to forego part of his debt upon payment of the residue at a fixed day, prompt payment being the consideration for the agreement, equity will give no relief in case of default, but will hold the mortgagee entitled to the whole

1 *Williams v. Owen*, 10 Sim. 386 and 5 Myl. & Cr. 308; *Acton v. Acton*, Pre. Ch. 237; 2 Abr. Eq. Ca. 596.

2 *Davis v. Thomas*, 1 Russ. & M. 506; Tam. 416; so in *St. John v. Wareham*, cited 8 Sw. 661.

3 *Eneworth v. Griffith*, 5 Bro. P. C. 184.

of his original demand,¹ notwithstanding continued payments of interest on the lesser sum.

And so where the transaction is entirely carried out by the instrument of conveyance, if the grantee have no power of compelling the repayment, as upon a conveyance of a reversionary interest in leaseholds,² with a proviso for redemption upon repayment of the consideration money and interest within five years; but, in default, the estate of the grantee to be absolute and indefeasible, and the grantor to be debarred forever from all right and relief in equity; and the grantor covenanted to release his equity. It seems clear that even these strong expressions of intention would not have availed if any power of compelling repayment had been reserved to the grantee. And where³ a mill, with the fixtures and business, were assigned to the equitable mortgagee thereof at a certain price (the business to be carried on by him) with a clause for resale within ten years, and a proviso that if the net profits of the business should not during six consecutive months at any period of the ten years produce such an amount as to pay the interest on the purchase moneys, and if the assignor should, within two months after notice, fail to pay the assignee the purchase money, with interest, or in case the purchase moneys and interest should not be wholly repaid by the end of ten years, then the agreement for reconveyance should be void, and the equity of redemption barred; this was held to be a sale with a right to demand a resale, the grantee having acquired no personal rights against any one, and having no means, other than those pointed out by the deed (*viz.* the waiting the expiration of the time limited), for making himself master of the property.

Upon an agreement by one who had contracted to buy an estate, that it should be conveyed to a person who had advanced him part of the purchase-money, with a proviso to be void on repayment of the advances with interest, and of the whole amount of the purchase-money at a certain day, otherwise the sale to be absolutely confirmed to the lender, the transaction was also held to be a conditional sale.⁴

¹ *Ford v. Earl of Chesterfield*, 19 Beav. 428.

² *Tasburgh v. Echlin*, 2 Bro. P. C. 266.

³ *Ogden v. Buttens*, 18 Jur. 791.

⁴ *Ferry v. Meddowcroft*, 4 Beav. 97.

It is the same if there be a conveyance of land, conditioned to be void on payment of a sum of money at a certain day ; for it is in the election of the settlor either to pay the money or to let the settlement stand, but not in that of the grantee to compel payment.¹

Somewhat akin to the case of a conditional sale is that of a condition in a settlement, that, upon payment of a sum of money in a certain event, the prior limitations of an estate shall cease, and the land go to the person paying the money ; as where² land was settled upon the issue of the intended marriage in tail, with a proviso that if there should be but one daughter, and no other child of the marriage, the land should be to the husband in fee, upon payment to the trustees of the settlement of a sum of money by his heirs, executors or administrators, within three months after his death. The event having happened, this was held to be only a security for money, and to be redeemable after three months ; and that, not merely by the heir or executor, but also by a creditor of the husband. But it will be different³ if the proviso be, that, unless (in the happening of the event) the person entitled under the limitation pay to another a certain sum within a limited time, the land shall go over to the latter in fee, for here there is a limitation over upon default of payment at the appointed day, to treat which as redeemable would destroy the distinction between a condition and a limitation over.

It follows from what we have seen of the nature of foreclosure, that in these cases of conditional sales and under settlements, there being no power in the person to whom the money may be paid to compel payment of it, and no forfeiture but a permissive right of payment only, there can be no foreclosure.

Another kind of redeemable interest is that in which the person to whom the consideration money is paid, grants, not the estate, but an annuity or rent-charge issuing thereout, with a clause of repurchase. Transactions of this kind were originally made (where loans were intended) for the purpose of avoiding the Statutes of Usury, and are now of common occurrence. The effect of the

¹ *King v. Bromley*, 2 Abr. Eq. Ca. 596 ; and see *Esuworth v. Grigith*, 5 Bro. P. C. 184.

² *Fredrick v. Agnewcombe*, 3 Eq. Ca. Abr. 594, M. N. ; 1 Ank. 302.

³ *Earl of Winchelsea v. Norcliffe*, 1 Vern. 430.

transaction is somewhat of the nature of a Welsh mortgage, the money borrowed being repaid by instalments, consisting partly of interest and partly of principal.¹

The tendency of the Court is to treat annuities thus granted with a power of repurchase, as redeemable annuities, and to admit unwillingly the distinction between redemption and repurchase in cases in which the grant of the annuity and the stipulation for repurchase form part of the same transaction; especially if the words "redemption" and "repurchase" appear to have been used synonymously; but the word "repurchase" will be construed with the strictness of a condition, where the grantee has been for some time in possession as purchaser.²

The presence of a stipulation that notice shall be given of the intention to repurchase, and the condition for repayment of the purchase money, with a further sum amounting to the value of the interest during the period of notice, are also circumstances³ upon which the Court will rely, as indications that a loan was intended, and that the object was to allow time to find another borrower, and to secure interest in the meantime: though the latter condition was one upon which Lord Redesdale thought that much stress ought not to be laid.⁴

In determining whether an instrument is intended to operate as a mortgage, or as an absolute or conditional sale, the circumstances attending the transaction will be looked at; and the facts that the grantee took immediate possession under the deed, and that the expenses of it were paid by him, contrary to the usual practice in cases of mortgage, will be some, but not conclusive, evidence of an intention of absolute sale.⁵ Circumstances of pressure upon the grantor, as where he is insolvent and in prison, or represented by the same solicitor as the grantee, will materially influence the Court in construing an apparently absolute or conditional sale, as a mortgage, where, in the absence of such circumstances, the mere insufficiency of price would be little regarded; and weight will be

¹ *Floyer v. Sherard*, Amb. 19; *Lawley v. Hooper*, 3 Atk. 281. But this seems to be the only resemblance, for possession is not of the essence of the transaction, and foreclosure may be had.

² *Longuet v. Seawen*, 1 Ves. 403; *Bulwer v. Astley*, 1 Ph. 422.

³ *Lawley v. Hooper*, 3 Atk. 281; *Bulwer v. Astley*, 1 Ph. 422.

⁴ *Verner v. Wintanley*, 2 Sch. & Lef. 393.

⁵ *Williams v. Owen*, 10 Sim. 386; and 5 Myl. & Cr. 303; *Davis v. Thomas*, 1 Russ. & M. 506.

also given to the circumstance, that, in the peculiar position of the grantor, a mortgage might be beneficial to him, when a sale would not.¹

It may be shown by parol evidence, that a contract that a conditional sale should become absolute upon the happening of a certain event, was entered into by the grantor with a full knowledge of the consequences,² and also what was the nature of an instrument uncertain upon the face of it;³ but such evidence will not be allowed to affect an inference that the transaction, though in form a sale, was only a mortgage, where that inference is founded upon strong circumstances. Thus, where a debtor gave to his creditor an absolute bill of sale of a ship at sea, and deposited with him a policy of insurance thereon, and drew bills upon him for further sums, engaging, but failing to pay them when they came to maturity, and the bills were renewed at the expense of the debtor, and the insurance was kept up and payments made by him on account of the crew: these facts were held to be consistent with, and evidence of, a mortgage, and not of a conditional sale intended to become absolute upon non-payment of the bills, although parol evidence was given by the creditor that the agreement was otherwise.⁴

SECTION II.—*As to Equitable Securities.*

A large class of securities which are subject to the principles upon which the ordinary rules of redemption and foreclosure are founded, but in which those rules, from the nature of the contract, are somewhat modified, are called equitable mortgages. They are simply securities by which no legal interest, in the property mortgaged, passes to the creditor, and thus include not only mortgages of the equity of redemption of property, the legal interest whereof has been already mortgaged, but also transactions in which property or the evidences of property come into the hands of the creditor, upon a written or verbal, express or implied agreement that such property

¹ *Fee v. Cobine*, 11 Ir. Eq. R. 406.

² *Newcomb v. Bonham*, 1 Vern. 8, 214, 232.

³ *Langton v. Horton*, 5 Beav. 9.

⁴ *Id.*

shall be answerable for the debt; as well as those transactions in which the intention or duty of creating a charge on property is held to arise, from an express or implied contract to render that property liable.

As to securities not being mortgages of the equity of redemption, which generally follow the form of legal mortgages :

An equitable mortgage may be created by a mere deposit of deeds with intent to create a security,¹ which intent may be established by written documents, coupled with parol evidence; by parol evidence simply, that the deposit was made by way of security; or by the mere inference of an agreement, drawn from the very fact of the deposit.² But in the last case, there must be no circumstances to rebut the inference,³ and the security will only be established where the possession of the deeds cannot otherwise be accounted for, or the holder is otherwise stranger to the title and land. Upon which principle, the possession by a solicitor of his client's deeds raises no inference that they are held in pledge for a debt, as against a purchaser who neglects to inquire into the nature of the possession.⁴ The inference that the deposit was intended as a security, also appears to be less strong in the case of a debt already due, than of a present advance, especially if the debt be of long standing; for it has been held,⁵ that a creditor cannot some years after the making of the loan, claim the rights of an equitable mortgagee upon the strength of a mere possession of the title deeds. To connect a debt of long standing with the possession of the debtor's deeds, the creditor must proceed upon a distinct allegation, supported by satisfactory proof that they were delivered to him by way of security. Nor, if the plaintiff's evidence of the deposit be defective at the hearing, will he be entitled to an inquiry to enable him to establish his security; it being contrary to the practice of the court to direct a reference at the hearing of the cause,⁶ upon a matter which involves the very root of the plaintiff's title.

¹ *Ex parte Kensington*, 2 Ves. & B. 88.

² *Featherstone v. Fenwick*, 1 Bro. C. C. 270, n; *Harford v. Carpenter*, id.; *Ex parte Mountfort*, 14 Ves. 406; *Ex parte Wright*, 19 Ves. 258.

³ *Ex parte Langstone*, 17 Ves. 227; *Edge v. Worthington*, 1 Cox. 211; *Eds v. Knowles*, 2 Y. & C. C. 172.

⁴ *Bozon v. Williams*, 2 Y. & J. 150.

⁵ *Chapman v. Chapman*, 13 Beav. 308; 15 Jur. 265.

⁶ *Holden v. Hearn*, 1 Beav. 466.

Still less will the inference arising from a deposit be allowed to prevail, if its effect would be to contradict the terms of a written instrument.¹

A. the equitable owner of property had it conveyed to his son, a minor, in trust for himself. A. afterwards signed the son's name to a mortgage of the property to a creditor, and added his own name as a witness. *Held* that the instrument, though void at law created a valid charge in equity.²

Where a mortgage was through error created upon a wrong lot of land, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title. The Court upon a bill filed for that purpose, ordered him to account for the proceeds of the sale, not exceeding the amount secured by the mortgage, with interest and cost of the suit.³

Where a mortgage was created by the deposit of title deeds, and the borrower signed a memorandum stating the sum loaned, and times for repayment, and agreeing to execute a writing to enable the lender to transfer, or control the mortgages so deposited. *Held*, that the memorandum did not require registration to secure its priority over a subsequently registered incumbrance, such memorandum not being in the language of the Act, "a deed, conveyance or assurance affecting lands."⁴ A subsequent incumbrance is entitled to a sale upon the usual terms, where the plaintiff is an equitable mortgagee by deposit of title deeds, as well as where the mortgage is by deed.⁵ A memorandum of deposit, given with deed, deposited by way of equitable mortgage, is not a "deed, conveyance, or assurance" within the meaning of Con. Stat. U. C. c. 89 s. 17, and does not require registration. Such a memorandum is only a matter of evidence, the mortgage being created by the deposit of the deed.⁶

An equitable lien or security may also be established by parol evidence of arrangements, the subjects of a separate agreement, or

¹ *Ex parte Coombe*, 17 Ves. 360.

² *Dennistown v. Fyfe*, 11 Grant 371.

³ *Lundy v. McKamis*, 11 Grant 578.

⁴ *Harrison v. Armour*, 11 Grant 303.

⁵ *Kerr v. Bebee*, 12 Grant 204.

⁶ *Harrison v. Armour*, 1 C. L. J. N. S. 134.

referred to in a deed relating to the transaction out of the which lien is held to arise; as where¹ incumbrancers joined in assigning their security upon the terms, that they should be secured by subsequent mortgages, which were never executed, they were held entitled to an equitable lien as second incumbrancers. So, also, upon real estate in favour of the obligee of a bond, by a recital therein, that the obligor had become possessed of real estate under a certain will, upon the execution whereof he had promised the testator to provide for such obligee.²

So, where³ a lease was made of certain premises, and the rent was assigned to the creditor; there being in the assignment a recital, that a security was intended, and a covenant for further assurance of the rent, the covenant was held to be in equity a covenant to make a mortgage, and the case to be within the rules of equitable mortgages.

An equitable security may even be established upon documents which remain in the keeping of the debtor, though in the legal custody of the creditor; as where a bundle of deeds marked "Cash Credit Security E. M. to the Royal British Bank," was found in a drawer of the bank used for his private business by E. M., who was the secretary of, and was indebted to the bank. By the help of parol evidence, this was held to be⁴ an equitable security for further advances in addition to other securities mentioned in a memorandum previously given. But in the absence of evidence, and where the security remains in the possession of the debtor, no lien arises by reason of a memorandum annexed to it, which purports to appropriate the proceeds to satisfy a particular debt, such a memorandum not amounting to an assignment.⁵

The security may also be established against property of which the title deeds have not been actually deposited, where a written undertaking, or expression of intention to deposit them, can be proved. Thus a letter referring to inclosed particulars of title deeds, and alleging that those⁶ deeds were deposited to secure a debt, was

¹ *Banks v. Whittall*, 1 De Ge. & S. 536; *Beckett v. Cordley*, 1 Bro. C. C. 353.

² *Ex parte Atkins*, 2 Y. & C. 536.

³ *Ex parte Wills*, 2 Cox. 232.

⁴ *Ferrie v. Mullins*, 18 Jur. 718; 2 Sm. & Gif. 373.

⁵ *Adams v. Claaton*, 6 Ven. 220.

⁶ *Ex parte Arkwright*, 3 Mont. Den. & De Gex 129.

held to create an equitable charge upon the estate comprised in the deeds, although, upon after inspection, nothing appeared to have been deposited but an old paid-off mortgage. But a parol agreement to deposit a deed will of course not be sufficient to create a security.¹

A deposit of a material part only of the deeds will effect a good equitable mortgage of the estate, there being no fraud, and good reason for not depositing the remainder.² And an equitable mortgage by deposit affects, *prima facie*, all the property comprised in the documents deposited; the onus of showing that the security was limited to part of such property being thrown upon the mortgagor, or those who claim subject to the mortgage.³ The extent to which the mortgagor is intended to be bound, will be measured by the written agreement where any exists, and will not be carried beyond the terms there expressed. Therefore a deposit of deeds with a partnership, accompanied by a memorandum addressed to the partners by name, expressing the deposit to be for securing moneys to be advanced by their house, will not, if there be nothing more, secure advances by the firm after a change in its members; though parol proof of intention that the deposit shall extend to the demands of the new firm will be held equivalent to a re-delivery of the deeds to them.⁴

Nor will the despoit cover any more than the sum which it was the principal object of the agreement to secure, though the agreement relate to other debts which may become due from the debtor to the creditor. Thus it was held⁵ at law that the pledge of a lease to secure the amount of a promissory note did not cover moneys which became due to the deposittee for goods; though it was a condition of the agreement that payment of the note should not be enforced within a certain time, if the interest and rent, as well as the price of goods to be purchased and used on the premises, should be regularly paid; the condition relating only to the enforcing of the note, and being ancillary to the principal object of securing the amount due thereon.

¹ *Ex parte Coombe*, 4 Mad. 240.

² *Lacon v. Allen*, W. Rep. 698, 1855-1856.

³ *Ashton v. Dalton*, 2 Coll. 566.

⁴ *Ex parte Kensington*, 2 Ves. & B. 79.

⁵ *Chalton v. Carrington*, 19 Jur. 80; 15 C. B. 95.

An equitable mortgage, being thus supportable by parol evidence, may by the like evidence¹ and also (as it seems to have been intimated)² by inference alone, arising from possession of the deeds, be extended to cover future advances. And a security was held to be so extended³ where the deeds were previously in the mortgagee's hands to secure a debt to another person by virtue of the terms of a written memorandum, though the defendant denied by his answer that the deposit was made.

Where the original deposit created no valid security, the contract being usurious, a parol agreement for a security with legal interest, and including further advances, was held on appeal⁴ to make a good mortgage by deposit, both for the original debt and further advances, though it was considered in the court below,⁵ that the original deposit being bad the possession remained unchanged, and that a fresh deposit or a written agreement must be shown to set up the security.

Where a voluntary settlor who had applied part of the trust moneys which had come to his hands in the purchase of an estate (the remainder having been lost by failure of the securities,) deposited with the trustees the title deeds of the purchased estate, the mortgage was held to extend only to the good consideration which was retained for it; viz., the sum invested in the purchase: though before the deposit the settlor had agreed (but afterwards refused) to execute a legal security for the whole trust money.⁶

A legal security cannot be extended by such means to subsequent advances made on a parol agreement for a further mortgage; because, it is said, the legal mortgagee holds his mortgage as a contract for conveyance only, and not for deposit.⁷ Parol evidence also is not admissible to show that the person with whom the deeds are deposited holds them for the security of another creditor's

1 *Ex parte Langston*, 17 Ves. 227; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *Ex parte Nettlehip*, 2 Monk. Dec. & D. G. 124.

2 See *James v. Rice*, 18 Jur. 374; Kay 281.

3 *Baynard v. Woolley*, 20 Beav. 583.

4 *James v. Rice*, 18 Jur. 318; 5 De G., M. & G. 451.

5 S. C. Kay, 281; 18 Jur. 373.

6 *James v. Bydder*, 4 Beav. 600.

7 *Ex parte Hooper*, 1 Mer. 7; and see *Shepherd v. Titley*, 2 Atk. 248; where, however, there was an intervening incumbency. Thus a person who has obtained a legal mortgage may, as to future advances, be in a worse position than an equitable mortgagee. But the distinction was confessedly made to avoid an extension of the doctrine acted upon in *Ex parte Langston*. The result justifies the remark made in another case by Lord Eldon, that "departing from the Statute, (of Frauds,) we have no rule to go by."

debt as well as his own; though if the depositee himself be no creditor but a trustee only, he may be shown to hold them for another's benefit.¹ The possession of the debtor himself cannot, it seems, be set up as a possession for the creditor; nor will an alleged possession for the latter by the debtor's wife be allowed,² though she swear that the deeds were left with her with that intent, and that she had ever since kept them under lock and key.

Where one of two tenants in common in tail, with cross remainders, deposited the deeds as a security for money due from him engaging to make a formal security when required, and the other simply joined in the deposit, it was held that only the moiety of the property which belonged to the former was affected by the security, which, as to the interest of the second depositee, only affected his estate in remainder.³ And a deposit of deeds made for the sole purpose of obtaining credit, will give the depositee no lien upon them in equity for moneys before advanced.⁴ It will be observed, that in these cases the inference arising from the deposit was rebutted.

A simple covenant or agreement to charge land will not create a charge in equity upon the debtor's real estate, where no particular estate is mentioned, or the agreement is only for a personal, with power to call for real, security. A promise in a note of hand for a debt to give a security by a mortgage⁵ of lands when required, or a mere covenant to settle lands of a certain value,⁶ will therefore not amount to an equitable mortgage; but the lien will arise if the covenantor be then possessed of lands to which the covenant may be held to refer; as if he covenant to make the charge within a month,⁷ or contract to charge such property as he may have at a future time,⁸ or to make a charge at a future period, on the arrival of which he actually has power to charge certain lands;⁹ and in such a case it seems the covenant will create a lien upon any property to which he may become entitled between the date of the covenant and

1 *Ex parte Whitbread*, 19 Ves. 309.

2 *Ex parte Coming*, 9 Ves. 115.

3 *Pryce v. Bury*, 17 Jur. 1178; 2 Drew. 11; and 15 Jur. 967.

4 *Mountford v. Scott*, Turn. & R. 274.

5 *Williams v. Lucas*, 2 Cox, 160.

6 *Fremoult v. Dedire*, 1 P. Wms. 429.

7 *Roundell v. Breary*, 2 Vern. 481; and see 4 M. & C. 561; and *Deacon v. Smith*, 3 Atk. 323-7.

8 *Metcalf v. Archbishop of York*, 1 M. & C. 547; 6 Sim. 224; *Lyde v. Minn*, 1 M. & K. 683; 4 Sim. 605.

9 *Wellesley v. Wellesley*. 4 M. & C. 561.

the day fixed for its performance ; which he cannot evade, on the ground that he may exercise an option, under the covenant, as to the estates to be charged. ¹

And a promise to pay a debt out of the estate of a deceased person, if the personalty be exhausted, will charge the realty, for the promise applies to all the estate.² And an actual, though incomplete, agreement for a mortgage, as where the debtor wrote to his creditor,³ agreeing to give him a mortgage of part of certain specified property, but between the letter and his death conveyed to trustees for the payment of his debts ; or a defective security,⁴ as amounting in equity to a good agreement to charge the land, will be carried into effect by a court of equity, according to the manifest intent of the parties.

It is, however, to be observed, that an agreement for, or preliminary step in, the effecting of a security, cannot be set up as an equitable mortgage if it have been laid aside unacted upon by the creditor. He must, if any lapse of time have taken place, be able to show that he intended to carry it out, and had taken the necessary steps to render his security effectual. Therefore a creditor to whom the debtor had given an order for the transfer of certain shares in a company, which he had not acted upon for three years, nor during that period had given notice to the company was held⁵ not to have any equitable lien on the shares, though it was proved that a sum of money had been advanced by the creditor upon the day on which the order was dated. Nothing had been done, which would have prevented the debtor from selling the shares to a stranger at any moment.

The question whether a delivery of title deeds, for the purpose of preparing a legal mortgage, will of itself operate as an equitable security, has been the subject of conflicting decisions ; but where there is already an existing debt, may perhaps be now satisfactorily answered in the affirmative. The contrary was formerly held by Lord Hardwicke⁶ (although the case was supported by parol evi-

¹ *Wellesley v. Wellesley*, 4 M. & C. 561 ; and see *Deacon v. Smith*, 3 Atk. 323.

² *Stuart v. Toulmin*, Fow. Mort. 1049, b.

³ *Str Simeon Stuart's case*, cit. 8 Ves. 576 ; and 2 Sch. & Lef. 381.

⁴ *Dale v. Smithwick*, 2 Vern. 161.

⁵ *Cumming v. Prescott*, 2 Y. & C. 488.

⁶ *Brick v. Manners*, 9 Mod. 234.

dence, on the ground of the uncertainty of the agreement proved, and because it was sought to bind the heir; which their was no proof that the debtor, even assuming his intention to execute a mortgage, intended to do,) by Lord Thurlow,¹ and Sir William Grant;² who considered that no intention being apparent, from a delivery for this purpose, of an intention to create a pledge, such an intention should not be raised by inference. Sir William Grant, however, appears to have assumed too strongly the want of intention to pledge, alleging that it was a thing which none of the parties had in contemplation. The fact was, that the evidence upon the point was conflicting, it being sworn by the solicitor who was to have prepared the mortgage, that he understood that the deeds were left with him, not only for that purpose, but also that he might keep them, together with the intended mortgage. And it seems ³ to have been well established by later decisions that an equitable security does arise by a delivery for the purpose of preparing an actual mortgage. It was remarked by Lord Eldon, that a deposit made with that object, is of greater force than an implied intention to mortgage arising from a mere deposit and consequently also amounts to a security.

It has been observed by Mr. Coventry, writing before the decision of *Keys v. Williams*, that the judgments of Lord Eldon and Sir William Grant disclose a want of attention to the distinction between a deposit as a pledge, and a delivery of deeds for the purpose of preparing a mortgage; and he remarks, that, in the latter case, the previous agreement explains the purpose for which the deeds were delivered, and rebuts the presumed contract which would otherwise arise, that the deeds were handed over with a view to a present security. The distinction is plain enough, but not necessarily applicable. The possession of the deeds is an incident of the legal mortgage. Now the principle set up in the old cases, and defended by Mr. Coventry, amounts to this,—that although a simple deposit of deeds may by inference alone amount to a security, yet a delivery for the purpose of making a better, *i. e.* a legal security, to the very person by whom under that security the possession is to be

¹ *Ex parte Duvel*, 2 Cox, 248.

² *Morris v. Wilkinson*, 12 Ves. 192.

³ See *Ex parte Bruce*, 1 Rose, 374; *Edge v. Worthington*, 1 Cox, 211; *Keys v. Williams*, 3 Y. & C. 55.

retained, is of less force. It would be strange if a creditor who has exerted himself to obtain a contract for a legal mortgage to secure his debt, and in consequence of that contract has obtained possession of the deeds, should be in a worse position than if he had obtained a lien on the deeds by mere inference, founded on possession; and unreasonable that the inference of a security, which the law would annex to his possession of the deeds, where he had made no actual bargain, should be taken away because he had stipulated for something which would carry with it a right to that possession. The question is entirely one of inference. Where a present loan is in course of negotiation, the delivery of the deeds for the purpose of preparing the mortgage would effect no security, because no debt would be in existence. But where a debt exists already, is it not at the least as reasonable to infer that a delivery for that purpose is as if the debtor had said,—“You are to have a mortgage which will carry with it a right to the custody of the deeds; therefore, take them at once, and prepare the mortgage at your leisure,” as to infer in the first instance that a deposit without any bargain at all should amount to a security? The doctrine of equitable mortgages being once established, the application of it to the cases under consideration seems, if it be an extension, to be one founded in reason and justice.

And the doctrine has been applied against executors ¹ in favor of a residuary legatee, whose share they had agreed to secure by a legal mortgage of part of the assets, although the mortgage did not bind the interests of the other legatees.

SECTION III.—*As to Vendor's Lien.*

The right of a vendor of land to a lien thereon, for the amount of his unpaid purchase-money, rests upon the plain principle of equity, that he who has obtained possession of an estate, under contract for payment of the price, shall not keep it without payment.² The question in what case the lien exists has been much discussed, and the result of the cases may be briefly stated as follows; it being

¹ *Hockley v. Bantock*, 1 Russ. 144.

² *Macroeth v. Symmons*, 15 Ves. 323.

premised, that where the consideration is expressed to be paid in the deed, but is in fact wholly or partly left unpaid, parol evidence may be given on the part of the vendee of the real transaction; as it is the vendor himself who, by claiming a lien, is the first to set up an equity against the written statement in the deed.¹

The lien exists generally (the contract not being illegal),² without distinction as to the freehold, copyhold or leasehold tenure³ of the estate, where the whole or part of the purchase-money is unpaid,⁴ and whether the consideration be a sum in gross, or an annuity;⁵ as against the purchaser, his heir, volunteers, persons having equitable interests, and purchasers with notice of the non-payment of the purchase-money, and claiming under the original purchaser.⁶

The lien is unaffected, though the vendor take a draft, note or bill of exchange⁷ negotiated,⁸ or otherwise (these being but modes of payment), for the unpaid money; neither is it lost by his taking security, by mortgage, bond or covenant,⁹ from the purchaser himself; and, as to a covenant, whether it be separate or contained in the purchase deed: nor by the purchase-money being made payable at a future day—as within a given time from the vendor's death.¹⁰ It may be saved, by a proviso that the estate shall not be assigned until payment,¹¹ without the consent of the vendor and the surety of the purchaser. And it extends to the assignee of the vendor, even though he claim only by parol assignment.¹²

A vendor of real estate who takes by way of security for the purchase money the joint and several promissory notes of the vendee and surety does not lose his lien on the estate for the purchase money though he took no mortgage therefor.¹³

1 *Winter v. Lord Anson*, 1 Sim. & St. 445.

2 *Ewing v. Osbaldeston*, 2 Myl. & Cr. 88.

3 *Winter v. Lord Anson*, 3 Russ. 492; *Matthew v. Bowler*, 6 Hare, 110; *Elliott v. Edwards*, 3 Bos. & Pul. 181.

4 *Harrison v. Southcote*, 2 Ves. 393; *Austen v. Halsey*, 6 Ves. 483; *Elliott v. Edwards*, supra.

5 *Tardiff v. Scrughan*, cited 1 Bro. C. C. 422; *Macreth v. Symmons*, 15 Ves. 323; *Clarke v. Royle*, 3 Sim. 499; *Sugd. V. & P.* 868, &c., 11th ed.; *Matthew v. Bowler*, 6 Hare, 110.

6 *Elliott v. Edwards*, supra; *Macreth v. Symmons*, supra; *Gibbons v. Braddall*, 2 Eq. Ca. Abr. 682, M. N.; *Walker v. Preswick*, 2 Ves. 622; *Cator v. Pembroke*, 1 Bro. C. C. 301.

7 *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Mills*, 2 V. & B. 308; *Gibbons v. Braddall*, 3 Eq. Ca. Abr. 682, M. N.; *Ex parte Peake*, 1 Mad. 346.

8 *Ex parte Loaring*, 2 Ross, 79.

9 *Tardiff v. Scrughan*, cited 1 Bro. C. C. 422; *Elliott v. Edwards*, 3 Bos. & Pul. 181; *Nairn v. Prouse*, 6 Ves. 762; *Macreth v. Symmons*, 15 Ves. 323; notwithstanding *Fawell v. Heelis*, 1 Bro. C. C. 421, n.

10 *Winter v. Lord Anson*, 3 Russ. 493.

11 *Elliott v. Edwards*, supra.

12 *Dryden v. Frost*, 3 Myl. & Cr. 570; and see *White v. Wakefield*, 7 Sim. 401.

13 *Colborne v. Thomas*, 4 Grant, 102.

A vendor's lien for unpaid purchase money has priority over the lien created by a registered judgment against the vendee.¹

Where a sale was made and conveyance executed before a Court of Chancery was established in Upper Canada, it was held that a vendor had, notwithstanding a lien for unpaid purchase money. Such a lien was enforced against subsequent purchasers, who, when they acquired their interest, had notice of the purchase money being unpaid.²

Land being conveyed in consideration of the vendee providing the vendor with maintenance, washing, &c., the vendor retains a lien for the consideration.³

On a sale of lands for £3,000, the purchaser paid at the time of the execution of the conveyance £2,750, and gave his promissory notes for the balance, payable in three and four years: afterwards he executed a mortgage to his father for the £2,750, alleged to have been advanced by him to his son to effect the purchase. The purchaser died intestate, without issue, and before the notes fell due the vendor filed a bill against the father as heir-at-law, alleging that he intended to sell the property so as to defeat the vendor's lien, and praying that it might be declared that he had a first lien or charge upon the estate for the amount due him. *Held*, that he was entitled to a decree for that purpose, but without costs.⁴ In a suit to enforce by sale a vendor's lien against the heirs-at-law of the purchaser, the widow of the vendee is a necessary party in respect of her right to dower.⁵ The defendant, a minor, purchased an estate and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age the defendant repudiated the mortgage, but adopted the purchase of bringing an action to recover possession. The mortgage being the deed of an infant was holden absolutely void. But it was also holden that the mortgage being void, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by the assignment of the mortgage.⁶ Where a mortgagee assigned the mortgage covenanting for the payment of the mortgage

¹ *Hughson v. Davis*, 4 Grant, 588.

² *Davis v. Bender*, 4 Grant, 620; and see *Harvey v. Smith*, 2 E. & A. 490.

³ *Paine v. Chapman*, 6 Grant, 388.

⁴ *Foulds v. Powell*, 6 Grant, 375.

⁵ *Paine v. Chapman*, 7 Grant, 179.

⁶ *Grace v. Whitehead*, 7 Grant, 691; and see *Wilson v. Daniels*, 9 Grant, 491.

money, and subsequent to an agreement between the mortgagee and assignee that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenant: *Held*, that he was entitled to a lien therefor as against the mortgagor.¹

I. and S., the owners of two distinct parcels of land, agreed to exchange the one for the other. S.'s land was subject to a mortgage which he agreed to pay off, but did not, and I. was compelled to redeem the same. *Held*, that I. was entitled to a lien on the land conveyed by him to S., as for unpaid purchase money, for the amount paid to redeem the mortgage.² A tract of land was bought by several parties with a view to laying off a portion thereof into building lots, and selling the same to purchasers: for greater facility in doing so the legal estate was vested in one of them as trustee however for the several parties interested. Subsequently one of the owners sold out his share, receiving in payment notes of hand, made by his vendee and endorsed by two other persons. *Held*, in error and appeal, reversing the decree of the Court of Chancery that the vendor did not under such circumstances retain any lien for the purchase money remaining unpaid.³

But if the consideration for the sale be the security itself, and not the sum secured;⁴ or if it appear by direct agreement; or can be clearly inferred from the circumstances, that the purchaser intended to rely upon the security only, and not upon the land, then the lien will be gone;⁵ for it is evident that the vendor has already got all that he bargained for.

Now as the lien is lost in these latter cases, not by the mere taking of a security. but by the taking it by way of substitution for the purchase-money, the question becomes in a great measure one of intention, and must be decided by the circumstances of each case.

A stipulation for payment of the purchase-money within a certain time after a resale,⁶ and the taking of a security by bond and mortgage of part of the estate,⁷ have thus been held indicative of an inten-

¹ *Fleming v. Palmer*, 12 Grant, 226.

² *Seney v. Porter*, 12 Grant, 546.

³ *Boulton v. Gillespie*, 2 Grant, 223.

⁴ *Winter v. Lord Anson*, 1 Sim. & St. 434; *Clarke v. Royle*, 3 Sim. 409; *Duckland v. Postnell*, 13 Sim. 406.

⁵ *Perrott v. Sweetland*, 3 Myl. & K. 655; *Winter v. Lord Anson*, 3 Russ. 492.

⁶ *Ex parte Parkes*, 1 Glyn. & Jam. 223.

⁷ *Copper v. Spottiswoode*, Tunt. 21.

tion to abandon the lien entirely. So where the vendor was party to a mortgage made by the purchaser to a person who had advanced part of the purchase-money, his lien was held¹ to be gone. And the taking a mortgage for part, and of a note payable on demand for the residue of the purchase-money, has been held² to have a like effect; on the strong but perhaps (says Lord Eldon,)³ not conclusive inference, that the charge for a part, showed an intention not to charge the residue. If the bond,⁴ instead of being given by purchaser alone, be also joined in by sureties, it is thought that the lien no longer remains.

The owner of land, after creating a mortgage thereon, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, and afterwards became the purchaser of the mortgaged premises, under a decree at the suit of the mortgagee, and at the sale the amount realized was not sufficient to cover the amount due to the mortgagee. *Held*, that under the circumstances he was not entitled to any lien on the estate for the deficiency.⁵ Where the purchase money of an estate was left unpaid, and a creditor of the purchaser (without notice) sued out an execution against lands, under which the premises in question were sold to the defendant, who had notice, the vendor's lien on the property for the unpaid purchase money was held to attach in the hands of the purchaser at Sheriff's sale. And *quære*, whether, if the purchase at Sheriff's sale had been completed without notice, the conveyance by the Sheriff would not have conveyed the property subject to all existing equities against the debtor.⁶ A purchaser of real estate executed to his creditor a mortgage thereon for a balance of unpaid purchase money, but which was not registered until after a judgment recovered against the purchaser had been recovered and registered. *Held*, that the judgment had priority to the mortgage, although the deed to the purchaser had never been registered; and that under such circumstances the vendor did not retain any lien for the unpaid purchase money.⁷

The lien of a vendor for unpaid purchase money is not waived by

¹ *Cood v. Pollard*, 9 Price, 544; 10 Price, 109.

² *Bond v. Kent*, 2 Vern. 281.

³ 15 Ves. 344. The report in Vernon, however, gives no reasons for the postponement.

⁴ *Cood v. Pollard*, 10 Price 109; *Supd. V & P.* 860, 11th ed.

⁵ *Forbes v. Adamson*, 1 Chamb. Rep. 117.

⁶ *Strong v. Lewis*, 1 Grant, 443.

⁷ *Burgess v. Howell*, 8 Grant, 37; and see *Hellivell v. Dickson*, 9 Grant, 414.

the fact of his suing and recovering judgment for the amount, although such recovery is subsequent to another judgment registered against the purchaser.¹

L. sold land to R. who paid £175 in cash, and assumed payment of two mortgages made by L. as one-third of the consideration agreed on; and a mortgage was executed by R. to secure another third of the purchase money. L.'s wife refusing to bar her dower, a bond was executed by R. providing for payment of the remaining one-third at a certain period. It was arranged, that in case of the death of L. or his wife before the time fixed, the money secured by the bond was to be paid within one year thereafter, to the survivor. *Held*, that under the circumstances L. had not waived his vendor's lien for that portion of the purchase money secured by the bond.²

On the sale of land the purchaser paid a certain sum in hand, gave a mortgage on other property owned by him for another portion of the price, and for the balance four promissory notes were to be given, made by the purchaser and such other persons as would render them saleable, without being endorsed by the vendor, one only of the notes was delivered. *Held*, that the vendor retained no lien on the property sold, for any portion of the purchase money. *Held* also, that the bill could not be sustained as a bill for specific performance, the agreement for the delivery of the notes being such as this Court could not execute, and the remedy being at law for breach of the contract.³

A vendor took from the purchaser a mortgage for part of the consideration money, but did not register the conveyance until several months after the deed to the purchaser had been registered:—in the meantime the mortgagor created a second incumbrance in favor of *bona fide* mortgagees, which was registered long prior to the first mortgage, without notice of the vendor's incumbrance. *Held*, that the want of a receipt for the consideration money upon the deed to the purchaser was not sufficient to postpone the second incumbrance.⁴ The principle that a vendor, by taking from a purchaser an endorsed note as security for unpaid purchase money does not thereby lose his vendor's lien, is equally applicable where the

¹ *Flint v. Smith*, 8 Grant, 339.

² *Rutherford v. Rutherford*, 11 Grant, 566.

³ *De Gea v. Smith*, 11 Grant, 570.

Shennan v. Parrill, 18 Grant, 8.

security given is a bond, in which a third person joins as security.¹ It is clearly settled that the rights and franchises of a railway company do not prevail over a vendor's lien : and where land was sold to a railway company for the purposes of the road, and a mortgage taken to secure the unpaid purchase money, it was held that the vendor's lien was not thereby lost.²

It has also been decided to be lost, by taking as special security a sum of stock, which, being sufficient, or probably sufficient, to cover the purchase-money, was held,³ to have been pledged, that the vendee might have absolute dominion over the land ; and on the same principle, it has been thought,⁴ a mortgage upon another estate of the vendee would have a like operation ; the obvious intention being to burthen one estate, that the other might be free. Sir W. Grant was of opinion, that a totally distinct and independent security would be a substitution for the lien, and not a credit on account of it ; by which he meant, says Lord Eldon,⁵ not that a security, but the nature of a security, might amount to satisfactory evidence, that a lien was not intended ; and the latter learned judge adds, that a mortgage is not conclusive ground for the inference that a lien was not intended, and that he could put many instances, that where a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien.

The opinion of Sir W. Grant appears to be acquiesced⁶ in as a general rule by Lord St. Leonards ; and the doctrine which may perhaps be deduced from the different cases cited, is, that the taking a distinct security is always *prima facie* evidence that the lien has been abandoned ; but that this inference may be rebutted by proof of an agreement, or of circumstances leading to a presumption of an agreement, to the contrary.

The Vendor of lands having taken a mortgage upon them for the purchase money, accepted from the purchaser a transfer of other lands, the price of which he endorsed in the mortgage ; and the lands so transferred being subject to incumbrances, the vendor took

¹ *Sheennan v. Parsill*, 18 Grant, 8.

² *Galt v. Erie and Niagara, R. Co.*, 15 Grant, 637.

³ *Nairn v. Prouse*, 6 Ves. 752.

⁴ *Nairn v. Prouse*, 6 Ves. 752.

⁵ In *Macreth v. Symmons*, 15 Ves. 348.

⁶ See *Sugd. V. & P.* 363, 11th ed., for the cases and doctrine on the subject at length, and *Macreth v. Symmons*, 15 Ves. 328.

from the purchasers their bond to discharge them, which having failed to do, the vendor was held entitled to claim under his mortgage against the lands sold by him, the amount of the incumbrances so left unpaid; the right of no third party intervening.¹ Land subject to a vendor's lien for unpaid purchase money was sold under execution at Sheriff's sale to a purchaser without notice. The execution debtor subsequently re-purchased the land from the Sheriffs' vendee in the name of a third party, who conveyed it to a brother of the debtor, in trust for the latter, who having become insolvent, made an assignment under the Insolvency Act of 1864. *Held*, that the vendor's lien attached on the lands in the hands of the assignee; but, *Seemle*, that the Sheriffs' vendee would have held free from the lien; though if the execution creditor had himself become the purchaser at Sheriffs' sale he could have so held the land, free from such lien, though ignorant of the letter, *Sed quære*.²

One of two partners on retiring from the partnership, conveyed to the remaining partner all his interest in the partnership lands, mill, and stock in trade, who gave the retiring partner his promissory note for £500, payable 1st September, 1867, agreeing at the same time, that in case of his effecting a sale of the premises before that time, to pay the note though not due. There was no evidence of any express agreement for lien on the property assigned. *Held*, that the circumstances were such as to negative the retention of any vendor's lien by the retiring partner.³

It may here be mentioned that the order of 29th June, 1861, directing money ordered to be paid, to be paid into some Bank, does not apply to a suit by a vendor to enforce his lien for purchase money. In a suit of this nature, in applying for the final order for sale, it is not necessary that the affidavit of the plaintiff as to non-payment should negative the fact of possession or the receipt of rents and profits.⁴

Where a surety undertook to pay the debt of his principal, and to keep down annuities granted by him, and to give him an

¹ *Baldwin v. Duignan*, 6 Grant, 595.

² *Van Wagner v. Findlay*, 14 Grant, 53.

³ *Muthers v. Short*, 14 Grant, 264.

⁴ *Saunders v. Heasty*, 1 Chanc. Rep. 254.

indemnity againss such annuities, upon having a mortgage in fee to secure the debt and value of the annuities, and afterwards the principal sold the reversion of the estate to the surety for the amount of principal and interest secured by the mortgage, and both joined in conveying to a third person without mentioning any lien to be had by the principal, it was held ¹ that for part of the consideration, viz. the debt, there was a lien, but not as to the annuities, the silence as to the debt and the fact that there was an indemnity against the annuities, being thought to show strongly that as to the latter, the personal security of the surety was alone relied on. And it was held material, that the sale was only of the reversion of the estate, inasmuch as it was unlikely that a person dealing for the consideration of annuities, and the purchase of a reversion which might not fall in until all the annuitants were dead, would rely on that reversion in addition to the indemnity already given by the bond.

It was also said, that if money be paid prematurely, it would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser; ² and it has accordingly been held, that a bill by a purchaser, where the contract was repudiated, praying a declaration that he was entitled to a lien upon the estate for his deposit, was not demurrable. ³ It appears, however, ⁴ that the lien only exists absolutely where the vendor is owner in fee of the estate; and that where he is a mortgagee selling under a power of sale, it does not exist against the mortgagor, but only against the mortgagee to the extent of his interest in the estate. ⁵

Courts of equity have in many other cases raised a lien upon property for money expended, or debts remaining unpaid; as, for instance, for the benefit of a creditor having authority from the debtor to repay himself the principal and interest of a debt out of the surplus arising from the sale of an estate in mortgage to the debtor, ⁶ or having a power of attorney to receive the rents of the estate, irrevocable until repayment of the debt with interest, and to apply them in payment of the interest and of the premiums on a

¹ *Macreth v. Symmons*, 15 Ves. 328.

² Per Sir Thomas Clarke, M. R., in *Burgees v. Wheate*, 1 W. Bl. 150; and see 15 Ves. 346; 2 *Sugd. V. & P.* 857, ed. 11.

³ *Wythes v. Lee*, 3 Drew. 896.

⁴ *Wythes v. Lee*, 3 Drew. 896.

⁵ As to marshalling in the case of the vendor's lien, see *Sugd. V. & P.* ch. 18, s. 2, p. 872, ed. 11; *Coots, Mort.* 223, ed. 3.

⁶ *Hodgson's case*, 1 Gl. & Jam. 13.

life policy by which the debt was secured ;¹ for the benefit of the assignee of a policy, for the amount of premiums paid after the assignment, with interest from the times of the several payments, as against persons who made out a prior title to the policy ;² of an annuitant, upon a fund in possession, for arrears of his annuity secured by an assignment of an interest in the same fund, (effected when it was only reversionary,) and for the consideration for the absolute purchase of the same reversionary interest ;³ of trustees, who, having a power of sale with the consent of a tenant for life, permitted him to sell and apply the purchase-money towards payment of the price of another estate, which was conveyed to the tenant for life in fee,⁴ but declared to be chargeable with the amount of trust money expended in its purchase ; of *cestuis que trustent*, upon securities given in consideration of advances, into which the trust moneys were inferred (under circumstances of great suspicion, though not clearly traced) to have been imported :⁵ of a person who has laid out money upon an estate, upon the faith of the due execution of a contract by another ; as where⁶ one who had purchased from a remainderman upon the representation that the tenant for life would concur in the sale, which he afterwards refused to do, took possession of the estate, and cleared off an incumbrance thereon, and was held entitled to a lien for the amount expended.

But the principle upon which a lien is raised in the case of vendor and purchaser, upon non-payment of the purchase-money, by mistake, or for the convenience of the purchaser, does not apply,⁷ where the vendors being known by the purchaser to be trustees the purchaser leaves part of the purchase-money in the hands of one of them under his absolute control, and without the concurrence of the co-trustees, or the *cestuis que trustent*.

A person who has *bona fide* advanced money on the security of a deposit of a deed, without notice that the property to which it relates is trust property, has a good lien thereon,⁸ and the means of redeeming him will be obtained, in the absence of any other fund, from the residue of the trust estate.

¹ *Abbott v. Stratten*, 3 Jo. & Lat. 608 ; *Spooner v. Sandilands*, 2 Y. & C. C. O. 390.

² *West v. Reid*, 2 Hare, 258 : see *Clack v. Holland*, 19 Beav. 262.

³ *Celmer v. Clay*, 7 Beav. 188.

⁴ *Price v. Blakemore*, 6 Beav. 507.

⁵ *Hartford v. Lloyd*, 20 Beav. 310.

⁶ *Ludlow v. Grayall*, 11 Price, 58.

⁷ *White v. Wakefield*, 7 Sim. 417.

⁸ *Sharslow v. Gibbs*, Kay, 333.

As to those transactions which are held to amount to equitable assignments by debtors, of debts or other choses in action in favour of their creditors, the principle upon which they stand, extends to create a valid equitable charge, where¹ there is an agreement between the debtor and creditor, that the debt shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money, or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor; and the concurrence of the person who owes the debt or holds the chose in action, which is the subject of the assignment, is unnecessary.²

A solicitor is entitled to a lien (which the court will protect by a stop order)³ upon a fund which, having been recovered by his exertions, has been paid into court, for the costs incurred in the recovery of the fund; but the lien does not extend to any other costs: ⁴ nor if the solicitor have been employed by a trustee can he compel the latter to extend his claim upon the fund in court, for the solicitor's benefit, to costs beyond the costs of suit; though the trustee himself may claim out of the fund all costs and expenses incurred by him.⁵

So as to funds not administered in court, the solicitor who is employed by a trustee has no lien upon the trust fund, though the trustee himself may retain his costs.⁶

This lien does not arise upon real estate recovered by the solicitor.⁷

A lien also arises in certain cases, in favour of solicitors, upon documents in their possession belonging to their clients, by means of which they are enabled to obtain payment of their costs and other moneys due from the latter. This, however, is a right in respect of which Courts of Equity give no active relief, and it is, therefore, not material to notice it in connection with the remedies

¹ *Rodick v. Gandell*, 1 De G., M. & G. 763, and cases cited there; *Ricoard v. Pritchard*, 1 Kay & J. 277; *Ward v. Audland*, 8 Beav. 201 and cases cited *id.* 213, note; *Holroyd v. Griffiths*, 3 Drew. 423.

² *Bell v. London and North Western Railway Company*, 15 Beav. 548.

³ *Hobson v. Shearwood*, 8 Beav. 486, and note there.

⁴ *Boson v. Bolland*, 4 M. & C. 364; *Lann v. Church*, 4 Mad. 391; *Hall v. Laver*, 1 Hare, 571.

⁵ *Hall v. Laver*, 1 Hare, 571.

⁶ *Worrall v. Harford*, 3 Ves. 4.

⁷ *Shaw v. Neale*, 20 Beav. 157.

immediately under consideration ; but as it sometimes happens in working out decrees for redemption and foreclosure, that a lien of this kind is set up, the subject will hereafter be noticed in considering the doctrine respecting the possession of the title deeds of mortgaged estates.

SECTION IV.—*Of Redemption.*

The person who seeks redemption must show a good right to redeem, the mortgagee being entitled to hold the estate against all who cannot do so ; and if the defendant can make out a case which goes directly to show that the title is in another person than the plaintiff, the latter will not even be suffered to redeem at his peril.¹ But a plea in bar to a redemption bill, on the ground of want of interest in the plaintiff, has been held bad, where the mortgagor had parted with his interest in the security to an assignee, for whose benefit he was seeking redemption ; though the assignee must be a party to such a suit.²

In 1821 the plaintiff mortgaged three premises, (in Belleville, Kingston and Camden), to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827, the mortgagees being then in great pecuniary difficulties, and the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, the property in Belleville, for what appeared to have been about its value at the time, and they gave credit for the amount on the mortgage. This property afterwards passed through several hands, and was bought by the present owner in 1837, who subsequently made considerable improvements on it, and dealt with it as absolute owner. *Held*, that this property was not redeemable by the mortgagor, on a bill filed in 1860, and that the effect of the sale and transfers by the mortgagees of the portion of the mortgaged property was to transfer to the purchasers a part of the mortgaged debt, proportioned to the value of the property transferred, as compared with the whole property mortgaged.³

¹ *Lomaz v. Bird*, 1 Vern. 132 ; see *Franchlyn v. Fern*, Bar. Ch. 30.

² *Winterbottom v. Taylor*, 2 Drew. 279.

³ *McLellan v. Maitland*, 3 Grant, 164.

The Court refused relief on a bill to redeem, filed in 1852 by a mortgagor, who had given a mortgage to certain executors in 1827, payable in 1832, on property of not greater value than the amount secured upon it. The mortgagees having in 1832, after the mortgagor's default, sold the property for less than was due on it, and the mortgagor having, therefore, given possession to the purchaser in pursuance of a letter from the acting executor (since deceased) to the mortgagor informing him of the sale, and requesting him to give the vendee possession, "in which case the executors relinquish all claim against you for the interest in arrear, &c." ¹

Where a security was effected by an absolute conveyance, and a law conditioned to reconvey on payment of the debt, but instead of doing so, the mortgagee sold and conveyed the premises to other persons, whom the plaintiff alleged, however, had notice of the true title, but the only notice having been shown to be a mere casual conversation which took place in a bar-room of a tavern, upwards of fifteen years before the filing of a bill by the mortgagor to redeem; the Court refused redemption, and dismissed the bill with costs.² The solicitor of mortgagees gave to the mortgagor a memorandum of the amount due, and, relying upon this, a third party purchased the equity of redemption. Upon a bill to redeem, the Court held the mortgagees not bound by the amount given in the memorandum, the evidence showing that the solicitor was not aware that the mortgagor had made the enquiry on behalf of the purchaser of the equity of redemption.³ A lent B. \$2,000 and took two mortgages from the borrower, each for \$1,000, on separate properties. The mortgagee foreclosed one of the mortgages, and then parted with the property. *Held*, no bar to a foreclosure of the other mortgage.⁴ To a suit by a second encumbrancer, to redeem the prior encumbrancer, the owners of the equity of redemption are necessary parties.⁵

If the right to redeem be fairly dependent on the validity of an instrument, there will be no declaration as to the terms of redemption until the question of validity has been settled.⁶ A trial at law

¹ *Clute v. Macaulay*, 4 Grant, 410.

² *Clarke v. Little*, 5 Grant, 363.

³ *Moffatt v. Bank of Upper Canada*, 5 Grant, 374.

⁴ *Bald v. Thomson*, 16 Grant, 177.

⁵ *Long v. Long*, 16 Grant, 239.

Blake v. Foster, 2 Ba. & Be. 387.

to settle the right may be granted, where a presumption of a plain adverse title to the equity is made out; as where¹ a person claiming to redeem under the heir general, the defendant set forth a deed of entail, by virtue of which the title appeared to be in another; but a trial will not be granted merely that a defendant who has produced no evidence of his own title, may have an opportunity of contesting the plaintiff's claim, especially if the claimant have been in possession as assignee of the mortgage, with knowledge of such claim.

The court, on the other hand, will act upon a *prima facie* title shown by the plaintiff, however complicated it may be, if it be supported by satisfactory evidence, and be uncontradicted, except by a mere allegation of an adverse claim; considering that the only matter determined is the right of redemption, the decree for which will not hinder an adverse claimant from asserting his title, at law or in equity, in another proceeding.²

So if, but not unless, the plaintiff make out a *prima facie* title to redeem, as by showing that he is an encumbrancer on the estate, the court, without determining in what rank he stands, or who are the other persons entitled to redeem or foreclose, will, upon motion in the cause, restrain³ the first mortgagee from transferring or assigning the mortgage security, and from conveying or otherwise dealing with the legal estate in the hereditaments comprised in the security, until the rights of the parties can be settled, upon the principle of protecting the security pending the litigation; but it will not interfere with the possession of the deeds. And the court will take this course the more readily if the first mortgagee have contracted to deal with the estate by surprise, or under circumstances showing an intention to deprive the *puisne* mortgagee of his rights; as where the agreement for sale was made after the filing of the bill to redeem, no objection having been made to the right to redeem till the six months' notice of payment had nearly expired.

Where the right to the equity of redemption is in dispute, the

¹ *Lomas v. Bird*, 1 Vern. 182.

² *Lloyd v. Wait*, 1 Ph. 61.

³ *Lloyd v. Wait*, 1 Ph. 61. *Pym v. Bowerman*, 3 Sw. 241, note; and see 2 Hare, 118, note (b).

⁴ *Rhodes v. Buckland*, 16 Beav. 213; *James v. Brou*, 3 Sw. 234.

mortgagee may file a bill, in the nature of a bill of interpleader, praying that the defendants may settle the right between themselves, so that the plaintiff may not put his money to a wrong hand.¹ But the court will not, at the instance of a mortgagee, direct inquiries to ascertain the title to the equity of redemption, where none of the persons claiming it are parties to the suit: because it is said,² the mortgagee having but a redeemable interest, if he were paid off, there would be no one to pay the costs of the inquiry.

Where the administratrix, having bought at Sheriff's sale the interest of the mortgagor, paid off the mortgage debt, and, treating the property as her own absolute estate, afterwards mortgaged the premises: the Court, at the instance of the heir-at-law of the mortgagor, directed an enquiry as to whether the property was purchased at Sheriff's sale with the assets of his ancestor, and that the amount so applied should be deducted from the amount due upon the mortgage given by his ancestor, and that he should be let in to redeem upon payment of the balance.³

Per Blake, C.: "As to the manner in which the account is to be taken, it is, we apprehend, quite clear that where an assignment of a mortgage is taken without communication with the mortgagor, the assignee takes subject not only to the then state of the account between the mortgagor and mortgagee, but also subject to all such changes as may take place before the mortgagor has notice of the assignment."⁴

A mortgagee having filed a bill to foreclose against two rival claimants of the equity of redemption, the Court directed the usual redemption by, and conveyance to, the person *prima facie* entitled to the equity of redemption, with a right to the other claimant, at any time before the day appointed for payment, to shew himself to be entitled.⁵ And where there was a conveyance of land, upon an advance of money, and a bond to re-convey given by the pretended purchaser, with a condition that at the end of a year, upon payment of the sum advanced, and an additional sum calculated upon the value of money for that time, the transaction

¹ *Shotbolt v. Biscoe*, 2 Eq. Ca. Abr. 178.

² *Wetherill v. Garbutt*, 1 Sm. & Gif. 124.

³ *Warren v. McKaysie*, 1 Grant, 436.

⁴ *Matthew v. Walwyn*, 4 Ves. 118.

⁵ *Ramsay v. Thomson*, 8 Grant, 372.

was held a mortgage, notwithstanding the instrument expressed it as a sale and purchase; but the bargainor, at the expiration of the year, surrendered the bond to re-convey to the assumed purchaser, and took from him a lease of the premises. *Held*, that this operated as a lease of the equity of redemption, and a bill to redeem was dismissed with costs, but without prejudice to another bill being filed, because it appeared, though not relied on by the present bill, that the bargainor was at the time in difficulties; that the assumed purchaser was supplying him with money, and paying money for him to the Sheriff; that their relative positions were such as to give the assumed purchaser great influence over the bargainor; that the inadequacy of price was gross, and that the pretended purchaser's conduct was exacting and oppressive; and if it had been shewn that the assumed purchaser held other security for the advance, as if the amount of it was included in a chattel mortgage, which he held against the bargainor, his right to redeem would have been clear.¹ And where there is a dispute as to the ownership of the equity of redemption, the decree in a foreclosure suit should usually contain a direction to the Master to enquire as to the ownership before a day is appointed for payment of the mortgage money.²

Where the owner of property mortgaged it to W., and then assigned an undivided half to J., subject to the mortgage, and at a later date executed a mortgage on his remaining undivided half to B., who afterwards obtained an assignment of the first mortgage: *Held*, that the representatives of J. were not bound to redeem both mortgages, but only the mortgage to W.³

Adverse claimants of the equity of redemption cannot generally sue as co-plaintiffs,⁴ because no decree can be made as between them; nor can they sue under an agreement, or an allegation of an agreement, to divide the property, because such an agreement is illegal concerning an estate of which the contracting parties are not in possession. But where the safety of the security itself is the object of the suit, the mortgagee and the persons entitled to the equity of redemption may sue together as co-plaintiffs; as in a suit

¹ *Fink v. Patterson*, 8 Grant, 417.

² *Cayley v. Hodgson*, 18 Grant, 483.

³ *Buckler v. Bowman*, 12 Grant, 457.

⁴ *Chotmondeley v. Clinton*, 4 Bligh, 1.

under the ejectment statutes in Ireland against the lessor to redeem the estate on eviction for non-payment of rent.¹

The prior mortgagee can only be brought before the court for the purpose of redemption; and the bill of any person entitled to redeem, whether the title be by devise, assignment, judgment or otherwise, and though it touch only part of the mortgaged estate, is open to demurrer on the part of the prior mortgagee, unless it contain an offer to redeem him.² The rule is the same when a decree for sale, and not for foreclosure, is sought; as has been laid down in reference to the practice in Ireland.³ And also where the plaintiff is a trustee; because the act of the mortgagor in creating a trust ought not to change the mortgagee's rights; and the trustee incurs no personal responsibility, except by dismissal with costs, in case of non-payment at the proper time.⁴

The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage. But this rule does not necessarily exclude the right of obtaining in the same suit against other parties, relief consequent on such redemption. When a mortgagor had assigned the mortgage property, and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and mortgagor was held not to be improper. But when such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed.⁵

It has even been doubted⁶ whether, if there were no offer to redeem, a dismissal of the bill would, according to the usual course of practice, have the effect of foreclosure. But it is submitted that such a doubt ought not to prevail; for the offer to redeem is merely a matter of form. If the bill make a case for, without praying redemption, the court will give leave to amend,⁷ and will not even listen to the objection if made for the first time at the hearing,

¹ *Malone v. Geraghty*, 3 Dru. & War. 239, 261.

² *Burroues v. Molloy*, 2 Jo. & Lat. 521; *Dalton v. Hayter*, 7 Beav. 313; *Truman v. Wearing*, 3 De G. & S. 729; *McDonough v. Shewbridge*, 2 Ba. & Be. 555; *Tasker v. Small*, 3 Myl. & Cr. 63; *Pearse v. Hewitt*, 7 Sim. 471.

³ *McDonough v. Shewbridge*, 2 Ba. & Be. 555.

⁴ *McDonough v. Shewbridge*, 2 Ba. & Be., 555.

⁵ *Rogers v. Lewis*, 12 Grant 257.

⁶ *Truman v. Wearing*, 3 De G. & S. 734.

⁷ *Palk v. Clinton*, 12 Ves. 493.

but will supply the omission, obliging the plaintiff to undertake to redeem according to the usual course.¹ But the rule that foreclosure shall follow dismissal upon non-redemption is a substantial right belonging to the mortgagee, corresponding to his right to foreclosure upon non-redemption where he is himself the plaintiff, and ought not to be affected by the mortgagor's omission to make a formal offer to perform the condition, upon which the court gives him relief.

In a foreclosure suit, the defendant, after having been arrested for contempt in not answering, employed the agent of the solicitor for the plaintiff to defend the suit; and after several proceedings by consent, a decree was made directing the money to be paid on 25th May, 1841. Three days before the time appointed for payment the plaintiff died, and the solicitor acting in the cause subsequently obtained an order appointing a new day for payment, and afterwards the final order for foreclosure by consent without taking any notice of the death of the plaintiff. The representative of the plaintiff afterwards conveyed to the trustee for the creditors of his ancestor, and he sold to a third party who again sold to the solicitor for the plaintiff, through whose agent all the proceedings had been taken, but who was ignorant of the defects existing therein. The defendant in the cause having died, his widow and devisee, about twelve years afterwards filed a bill to redeem, setting forth the above facts. *Held* (per Blake, C.), that the proceedings after the death of the plaintiff were nullities; the solicitor must be taken to have had notice thereof, and the right to redeem had never been foreclosed. But *held* (per Spragge, V. C.), that the proceedings were merely irregular; that the solicitor was a purchaser for value without notice, and was not bound by the facts within the knowledge of his agent, and that, under the circumstances, the right to redeem had been extinguished.²

The bill must however relate to the very estate which is comprised in the security; for if it relate to different property, which has been made subject to or mixed up with the mortgage debt, by a deed to which the mortgagee was no party, and the suit cannot be effectual without his presence, he may be joined without any

¹ *Baile v. Lord*, 2 D. & W. 480.

² *Arnell v. Wilson*, 5 Grant, 470.

offer to redeem him. Therefore where estates had been conveyed upon trust to sell, and pay off the mortgage debt, so as to exonerate the mortgaged estate, and it was charged that the mortgagee claimed an interest in the trust estate, it was held ¹ to be unnecessary to offer to redeem him. And the prior mortgagee, if he be a necessary party in respect of accounts, may waive the redemption of his security, in which case the decree should be prefaced by a statement that he consents not to be redeemed, and to allow his debt to remain a charge upon the estate.²

The rule that a mortgagee of several estates may refuse to be redeemed in respect of one unless redeemed in both, does not apply to a case where a sale is asked by a prior incumbrancer.³ But on the re-hearing of this case,⁴ it was held that in a suit for the sale of mortgage property, it appeared that a *mesne* incumbrancer held a mortgage on other property of the mortgagor, the Court ordered an account to be taken of what was due on both securities, and, in default of payment, a sale, but intimated, that in the event of a sale taking place, the premises would be conveyed to the purchaser relieved of any lien of such subsequent mortgagee.

A mortgagee of lands not patented purchased them at Sheriff's sale under execution against the mortgagor, to whom the lands had been conveyed at the instance of the execution creditors, in order to enable them to take the lands in execution during the absence of the mortgagor from the country, and the mortgagee then claimed to hold the lands absolutely. *Held per Curiam* (Spragge, V.C., dissenting), that the estate was still redeemable.⁵

The owner of an equity of redemption filed a bill impeaching the mortgagee's title on the ground that no money was advanced, but the Court being of opinion that the evidence was sufficient to establish the fact of payment, directed, at the option of the defendant, that the bill should be dismissed with costs, or the usual decree made for redemption upon payment of what should be found due upon a reference to the Master.⁶ In a suit to redeem, the plaintiff

¹ *Dalton v. Hayter*, 7 Beav. 313.

² *Lord Kensington v. Bouverie*, 19 Beav. 39.

³ *Merritt v. Stephenson*, 6 Grant, 567.

⁴ 7 Grant, 22.

⁵ *Atchison v. Coombs*, 6 Grant, 648.

⁶ *Bedson v. Smith*, 10 Grant, 292.

alleged several grounds for relief which he failed to establish, although he succeeded in showing a right to redeem, which right the defendant had contested; the Court, under the circumstances, refused costs to either party up to the hearing, and gave the defendant the subsequent costs of a redemption suit where the right to redeem was admitted.¹

If the bill be against the grantee of an annuity in possession of the estate, for an account of rents and profits, the plaintiff must offer to redeem on the terms of the annuity deed; or, if time have altered the circumstances, then upon² such equitable terms as the court shall direct. But it was held by Lord Lyndhurst, C. B., in a suit to recover possession of an estate mortgaged to secure a gambling debt, that no offer of repayment of a part of the debt, which had been bona fide advanced, was necessary, because, as in the case of the prayer for an account, the filing of the bill amounted to a submission to such decree as the court should think fit to make.³

The offer to redeem, or other equity offered by the bill, should correspond with the decree to which the party is entitled.⁴ If the offer be made by the mortgagor, in a suit by the mortgagee, not seeking foreclosure but to have his security perfected, the offer must extend to payment of all that the mortgagee claims to cover by his security, in case he establishes his right; otherwise there can be no foreclosure in case of default in payment, in pursuance of the offer; and in a suit in which that decree cannot be made, the amount of the mortgagee's debt may not be brought into question.⁵

And as a general rule, an offer gratuitously made by the bill or answer cannot be recalled.⁶ And a person who offered to redeem, under the belief that the debt, to which the offer applied, was all that was secured on the estate, was held to his offer, though it proved that the property was subject to more debts than it was worth, and though he submitted to be foreclosed.⁷ But the offer

1 *Boswell v. Gravley*, 16 Grant, 523.

2 *Knabell v. White*, 2 Y. & C. 16; *Burroues v. Molloy*, 2 Jo. & Lat. 521.

3 *Parker v. Alcock*. Younge, 361.

4 *McDonnough v. Sheubridge*, 2 Ba. & Be. 555.

5 *Grugeon v. Gerrard*, 4 Y. & C. 119.

6 2 Sw. 134; *Bazzalgatti v. Battine*, 2 Sw. 156, note.

7 *Holford v. Burnell*, 1 Vern. 448; 1 Eq. Ca. Abr. 25.

will not be enforced, where it is so limited in its terms as not to be strictly applicable to the state of affairs which has resulted from the hearing of the cause. Therefore, where a mortgagee disputed a lien, which was claimed upon the title deeds, in priority to his mortgage, but offered to discharge it in case the lien should be established by the court; the decision being against the lien, the plaintiff was held to be discharged of his offer.¹

Where a mortgagee is made party to a bill, the prayer for relief amounts to a prayer for redemption, because redemption is the proper relief, and dismissal will be the penalty of non-payment, upon the account being taken, just as if redemption had been specially prayed.²

SECTION V.—Of Foreclosure.

After the mortgage has become forfeited³ by non-payment of principal or interest,⁴ where any time has been fixed for payment, and, where none has been fixed, at any time after the lending of the money, the mortgagee or other person entitled to the mortgage debt may require payment at as short a warning as he will;⁵ and according to the nature of the security, or of his interest therein (and where the security is copyhold, without first taking admission,⁶ may file a bill for foreclosure or sale of the incumbered property; in the prosecution of which he may not debate the title to the estate, because⁷ the course of the Court on such a bill is to go no further than to take away the equity of redemption, and leave the plaintiff to such title as he has; but not to amend it.

Upon default in payment by a mortgagor of any instalment of interest upon mortgage money, the mortgagee has a right to call in the whole amount secured by the mortgage.⁸

1 *Pelly v. Wathen*, 7 Hare, 352; S. C. in app. 1 De G., M. & G. 16.

2 *Cholmley v. Countess Oxford*, 2 Atk. 267; *Palk v. Clinton*, 12 Ves. 48.

3 *Bonham v. Newcombe*, 1 Vern. 232.

4 *Gladwin v. Hitchman*, 2 Vern. 134; *Burrowes v. Molloy*, 2 Jo. & Lat. 521.

5 2 Ca. & Op. 61; see *Holmes v. Bell*, 2 Beav. 298; *Jarm. & Byth. Conv. ed. 3*, vol. 6, p. 676, n.

6 *Sutton v. Stone*, 2 Atk. 101.

7 *Anon.*, 2 Ch. Ca. 244. "And this," adds the reporter, "was the true and ancient course, though of late sometimes the contrary hath been done." 80 Car. 2.

8 *Cameron v. McKee*, 3 Grant, 311; and see *Sparks v. Redhead*, 3 Grant, 311.

Order 461 provides that "Where a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property, for default in the payment of interest, or of an instalment of the principal, defendant may move to dismiss the bill upon paying into Court the amount then due for principal, interest, and costs." And Order 462, that "Where a suit has been instituted for the purpose and under the circumstances specified in the last Order, a defendant may move to stay the proceedings in the suit, after decree but before sale or final foreclosure, upon paying into Court the amount then due for principal, interest, and costs." And Order 463 that "Where an application is made to stay the proceedings under Order 462, the decree may afterwards be enforced, by order of the Court, upon subsequent default in the payment of a further instalment of the principal, or of the interest."

Where a bill is filed for the foreclosure of a mortgage, payable by instalments, and the defendant moves to dismiss on payment of the instalment and interest then due, the interest upon the mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application.¹ But a mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due, and a bill to foreclose which has been filed.² In equity a tender by a mortgagor stops interest.³

Where a decree of foreclosure obtained upon a mortgage payable by instalments has been stayed upon payment of the amount actually due, and a subsequent default occurs, the proper order to make is to direct the whole sum secured to be paid, with liberty to the defendant to pay the sum actually due, and stay proceedings thereon. Where by his report made under a foreclosure decree, the⁴ Master appointed a time for all the subsequent incumbrancers who proved before him to redeem the plaintiff, one of whom, at the time appointed, paid the amount, and took an assignment. *Held*, that the incumbrancers who could not redeem were entitled to

1 *Strachan v. Murney*, 6 Grant, 378; and see *Moore v. Merritt*, 6 Grant, 550.

2 *Green v. Adams*. 2 Cham. R. 134.

3 *Knapp v. Bower*, 17 Grant, 495.

4 *Strachan v. Devlin*, 1 Cham. R. 3.

three months' further time before the co-defendant could obtain a final foreclosure against them.¹

In suits of foreclosure, where there are several judgment creditors, the decree should give the creditors successive rights of redemption, although very short periods must be fixed for the purpose. *Semble*, that after payment of what is payable upon a mortgage payable by instalments, pursuant to the Orders of 1853, it is irregular to take any further proceedings in the cause until after another instalment falls due.²

A mortgagee with power of sale, covenanted that no sale, or notice of sale, should be made or given, or any means taken to obtain possession of the mortgaged premises, without first giving three months' notice to the mortgagor, demanding payment. *Held*, that this did not prevent him filing a bill to foreclose, without first giving such notice.³

A mortgage was made for £1196, payable £200 in four months, £200 in eight months, and £224 in twelve months; the residue at later periods. The third instalment was paid. For the first and second instalments the mortgagor gave two promissory notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R. B. W. his notes for £200 at four months, and £200 at eight months, from 1st June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date;" and the following endorsement was made on the mortgage: "Received from R. B. W. two notes of hand, endorsed by L., for £200 each, to complete the two first payments on the within mortgage." The notes were not paid at maturity, and in a suit by the assignee of the mortgagee to foreclose in default of payment of the first and second instalments, *Held*, that the right to recover upon the mortgage was only suspended, and not discharged by the taking of the notes.⁴

The bill ought to be expressly framed for the relief sought at the hearing. If, indeed, the prayer be merely for general relief, and

¹ *Ardagh v. Wilson*, 2 Cham. R. 70.

² *Carroll v. Hopkins*, 4 Grant, 431.

³ *Lamb v. McCormack*, 6 Grant, 240.

⁴ *Gibb v. Warren*, 7 Grant, 496.

the relief adapted to the case made by the bill be redemption or foreclosure, that relief will be granted;¹ and if specific relief, to which the plaintiff is not entitled, be asked, although this prevents the proper relief from being given under the general prayer, the Court will give leave to amend by adding parties with the necessary introductory statements, and praying proper relief: though not to the extent of making a new case or putting new matter in issue.² But if the bill make a case which is inapplicable to or inconsistent with the relief prayed at the hearing, as if the bill expressly save the rights of a defendant whom it is afterwards sought to foreclose, it will be dismissed.³

A person interested in part only of a sum due on mortgage, cannot sue for foreclosure of a corresponding part of the estate.⁴ His remedy is to make the other mortgagees, if they refuse to join in his suit, defendants; upon which an account will be directed of what is due to the plaintiff, and the other mortgagees: and on payment or default, reconveyance or foreclosure will be decreed in the usual way.⁵

Where a mortgagor had executed several mortgages, in one only of which his wife joined, the proper decree on a bill of foreclosure against the widow and devisees of the mortgagor, is one in the usual form against them all, with a declaration that, upon payment of the mortgage executed by the widow, she should, if she chose, be let into her dower.⁶ A mortgagor who holds several mortgages in fee in the same land, one of which is not due, cannot file a bill to foreclose that mortgage with the others.⁷

A mortgagee, who upon the delivery of bills to him in discharge of his debt, has signed a receipt for the mortgage money, and has delivered the deeds, but has not reconveyed the estate, retains his right of foreclosure if the bills be dishonored, and there be no evidence of an agreement that the bills were to be taken as an absolute payment,⁸ whether they proved to be valuable or not; and even if the estate be reconveyed, it seems that by analogy to

¹ *Palk v. Clinton*, 12 Ves. 48.

² *Palk v. Clinton*, 12 Ves. 48; *Watts v. Hyde*, 2 Ph. 406; see *Page v. Cooper*, 10 Beav. 306.

³ *Hughes v. Williams*, 3 Mac. & G. 688; and see 1 Hare, 536.

⁴ *Palmer v. Earl of Carlisle*, 1 Sim. & S. 423.

⁵ *Davenport v. James*, 7 Hare, 249.

⁶ *Teed v. Carruthers*, 2 Y. & C. C. 31.

⁷ *Thibodo v. Collar*, 1 Grant, 147.

⁸ *Teed v. Carruthers*, 2 Y. & C. C. C. 31.

the right of a vendor,¹ who has been paid for an estate by bills which are dishonored, and has signed a receipt as for cash, the mortgagee would retain a lien on the estate for his debt.

If trustees, authorized to raise money by mortgage, have also authority to give receipts (and such a power is implied where they have power to change and convert the securities,)² it is not necessary, for the mortgagee's title to foreclosure, to show that the money reached the hands of the trustees if they have given a receipt, or that it was duly invested, though it be alleged that the money did not reach their hands, where the mortgagee was no party to the misapplication.³ And where the original mortgagee is not bound to enquire, his assignee, being a purchaser with the legal estate, is not affected by such a misapplication.⁴

The mortgagee, as a general rule, has the right of pursuing at the same time all his legal and equitable remedies; he may at once foreclose, take possession of, or bring ejectment for the estate, and may sue the mortgagor on his bond or covenant.⁵

A derivative mortgagee may even bring at the same time two different suits for redemption or foreclosure, with which the court will not interfere, though they be carried on by the same solicitor, except by making the plaintiff pay costs for the vexation.⁶ And if it be not done to accumulate expense, the mortgagee may sue for foreclosure, after a decree for redemption⁶ [until the arrival of the day fixed by that decree for payment:] though it seems that if an account have been directed by consent in the redemption suit, and the plaintiff have undertaken to pay what should be found due, the mortgagee, proceeding on the undertaking, cannot avail himself of the right of foreclosure,⁷ which, according to the ordinary practice follows default in payment.

But there may be cases of fraud or special contract, or other particular circumstances, in which the court will restrain the exer-

¹ See *Frail v. Ellis*, 16 Beav. 351; *Grant v. Mills*, 2 Ves. & B. 306

² *Wood v. Harman*, 5 Mad. 368

³ *Locks v. Lomas* 5 De G. & S. 326.

⁴ *Burnell v. Martin*, Doug. 417; *Barker v. Smack*, 3 Beav. 64; *Cockell v. Bacon*, 16 Beav. 158;

Lockhart v. Hardy, 9 Beav. 349.

⁵ Per Lord Hardwick, 1 Ves. 645.

⁶ *Shepherd v. Titley*, 2 Atk. 348; and see 4 Y. & C. 123.

⁷ *Dunstan v. Patterson*, 2 Ph. 341.

cise of this unlimited right. Thus the mortgagee's action of ejectment has been stayed (on security being given to redeem) by reason of intangled accounts, where a suit for an account was also pending against the mortgagee, and it was considered beneficial to all parties to keep the possession in suspense in the meantime.¹ And where the vendor of an estate had taken a bond for the unpaid purchase money, he was ordered to elect in which court he would proceed.²

The mortgagee may also lose his remedy by *laches* as against a later incumbrancer without notice, whom he suffers to enter and retain possession of the estate for many years, without requiring any payment on account of his security, or any admission of title; and under such circumstances a bill, filed to set aside the later incumbrancer's security, will be dismissed.³

Where an advowson is the subject of the mortgage, the court will also restrain the *quare impedit* of the mortgagee upon the mortgagor's offer to redeem, and will compel the resignation of the mortgagee's and the presentation of the mortgagor's nominee: for the mortgagee cannot make any legal profit of the right of presentation.⁴

So a mortgagor has a right to be protected against a double account of the amount due on the same mortgages, and a mortgagee was therefore restrained from proceeding in a foreclosure suit, in a colonial court, begun after a decree directing inquiries and accounts in an English suit for redemption; all the parties being in England, and the facilities for taking the accounts there being greater; but the plaintiff in the English suit was put upon terms to submit to such orders in the colonial court as the English Chancery should think reasonable.⁵ And the mortgagee has been restrained from proceeding at law⁶ on his collateral security, where the title deeds being out of his power, he was unable to re-convey the estate, the amount due being directed to be ascertained and paid into the bank,

¹ *Booth v. Booth*, 2 Atk. 243.

² *Barter v. Smack*, 3 Beav. 64; see 1 Ord. 9 May, 1839; 16 Ord. 8 May, 1845, ss. 20, 21; 51 Ord. id.

³ *Searle v. Colt*, 1 Y. & C. C. 38.

⁴ *Amhurst v. Dawling*, 2 Vern. 400; *Jory v. Cox*, cited *id.* note; and see *Gardner v. Griffith* 2 P. Wms. 403.

⁵ *Beakford v. Kemble*. 18 Sm. & St. 7.

⁶ *Schoole v. Sall*, 1 Sch. & Lef. 176

there to remain until the title deeds could be secured, and a re-conveyance had,

But the mortgagee will not be restrained from selling, on the application of an incumbrancer claiming to restrain him from doing so by virtue of a contract which he is at the same time impeaching. As where¹ the assignee of a *puisne* mortgagee, whose assignor was privy to a transaction by which the first mortgagee's rights were admitted, had filed a bill to impeach those rights, and attempt to stop the sale on the ground, that by the same transaction the first mortgagee had limited his power of sale.

Nor will the court interfere with the mortgagee's action on his covenant, on the ground that a contract still incomplete has been made by him, to sell the estate for a larger sum than the amount due on the mortgage.²

The trustee of property belonging to a public body, being a mortgagee of the same property, under an instrument duly executed in pursuance of the trust deed, and for the purposes of the trust, will not be restrained from exercising his mortgagee's rights, and in so doing from using the property in a manner opposed to the trust under which he acts.³

A mortgagee who makes advances to trustees under a trust to raise money by mortgage or sale, is not an object of the trust, save that the trustees were thereby enabled to make him a good security. He has all the remedies of a mortgagee, but nothing more; and even if the trustees have power to sell after raising money by mortgage, the mortgagee cannot call upon them to exercise their power.⁴

The mortgagee's right to enforce his securities, is not confined to the institution of a suit which shall put an end to the mortgage. He may also at any time, until the arrival of the day of payment fixed in a redemption suit, file a bill to compel a conveyance to

¹ *Cockell v. Bacon*, 16 Beav. 158.

² *Willes v. Levett*, 1 De G. & S. 392; but the report is not very clear. The prayer was to restrain the sale as well as the action, and the common injunction is said to have been granted in those terms. The Vice-Chancellor's observations appear to refer only to the action, but the whole injunction seems to have been dissolved.

³ *Attorney-General v. Hardy*, 1 Sim. N. S. 338.

⁴ *Palk v. Clinton*, 12 Ves. 49; and see *Page v. Cooper*, 16 Beav. 396.

himself of the legal estate, or otherwise for the protecting of his security, and this may be done even after an actual tender to him of the amount alleged to be due, if the proper notice of payment had not been given; and even after notice, if the sum tendered be considered insufficient through at the peril of costs if it turn out that a proper amount was tendered.¹

And in such a suit, the court will not enter into the question of the amount due upon the security, unless, it seems, there be such a complete offer by the defendants to pay all that shall be found due, if the whole of the mortgagee's claim be established, as will enable the court to decree a foreclosure in case of non-payment in pursuance of the offer.

So the mortgagee of a remainderman who has a vested (but not of one who has only a contingent)² interest, and whose title is clear, and free from reasonable cause of litigation, may sue the tenant for life for production and inspection of the title deeds, that the plaintiff may be enabled to deal with his property to the best advantage; and if it be suggested, that the production is required for an improper purpose, the burden of proving the assertion lies on the person who resists the production.³

The mortgagee may also proceed generally against the assets of of the deceased mortgagor, in which case, he may,⁴ and ought,⁵ to sue on behalf of himself and all other creditors of the mortgagor, though it was formerly considered, that the conflict between his interests and that of the other creditors was a bar to that form of suit.⁶

A mortgagee may foreclose without taking possession, which the court will never compel him to do, because it makes him liable to an account;⁷ but if he have been in possession, it is proper to state the fact in a bill, and the omission to do so may affect his right to cost.⁸

1 *Grugeon v. Gerrard*, 4 Y. & C. 119; *Malone v. Geraghty*, 3 Dru. & War. 246; see also *Sporle v. Whayman* 24 L. J., Ch. 789; 20 Beav. 607.

2 *Noel v. Ward*, 1 Med. 322.

3 *Davis v. Earl of Dysart*, 20 Beav. 405; 19 Jur. 743.

4 *King v. Smith*, 2 Hare. 239; *Skey v. Bennett*, 2 Y. & C. C. C. 405; *Brocklehurst v. Jessop*, 7 Sim. 438; *Parsons v. Westbrook*, 5 Beav. 188.

5 *Blair v. Ormond*, 1 De G. & S. 428.

6 1 Sim. & St. 362; *Raikes v. Hall*, Exch. E. T. 1838, cited 3 Y. & C. 606.

7 5 Ves. 106.

8 *Binnington v. Harwood*, T. & B. 477.

Of the Right to the Mortgage Debt.

It was formerly considered, that, although where there was a collateral security by bond or covenant for the mortgage debt, it belonged to the personal representative of the mortgagee; yet that if there were no such security, nor any want of assets, and the condition of a mortgage in fee was for payment to the heir or executor, the heir might become entitled to the land, as real estate absolutely vested in the mortgagee.¹ But it was soon after adjudged, and has ever since been held, that in all mortgages the money must go to the executor or administrator and not to the heir of the mortgagee, unless the later in his lifetime,² or by his will,³ do otherwise dispose thereof. And this doctrine rests on the ground that the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; as soon as the mortgagor pays the money, the land belongs to him, and the money only to the mortgagee. And the question of assets or no assets, or the existence or want of a personal security, was declared to be no measure of justice to the personal representative, but only a pretence to favor the heir.⁴ Nor is the entry by the mortgagee an act which makes the mortgage part of his real estate.⁵

The heir of the mortgagee is, therefore, before foreclosure, or release of the equity of redemption, only a trustee for the mortgagee's executors, and if the mortgagor himself be the heir of the mortgagee, the legal estate will not pass to the devisee of the mortgagor, under a general devise of real estates in trust for sale;⁶ for to hold the contrary, would be to assume that the mortgagor had authorized his devisee to make a sale, which would be a direct breach of trust.

The executor of a mortgagee has not, under the provisions of the Statute (Con. Stat. U. C. ch. 87, section 5), any power to sell and convey the legal estate held by his testator to a person purchasing

1 *St. John v. Grabham*, 11 Car. 1, cited 2 Ch. Ca. 88.

2 *Cotton v. Iles*, 1 Vern. 271.

3 *Noy v. Mordaunt*, 2 Vern. 581.

4 *Smith v. Smoult*, 2 Ch. Ca. 88; *Thornborough v. Baker*, 1 Ch. Ca. 23; 3 Sw. 628; *Meeker v. Tanton*, 2 Ch. Ca. 29; *Winn v. Littleton*, 1 Vern. 3; *Tabor v. Grover*, 2 Vern. 867; *Canning v. Hicks*, 1 Vern. 412.

5 *Noy v. Ellis*, 2 Ch. Ca. 220.

6 *Ex parte Marshall*, 9 Sim. 555.

the mortgage.¹ To remedy the inconveniences pointed at by the Chancellor in this case, the Statute of Ontario, 32 Vic. ch. 10, was passed. It repeals sec. 5 of ch. 87, Con. Stat. U. C., and enables executors or administrators of mortgagees to release the land, to assign the security, and to convey all the legal estate in the mortgaged premises.

SECTION VI.—*Of Sale.*

The Court of Chancery in England is empowered by statute,² in any suit for foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure, on such terms as the court shall think fit; and, if the court shall so think fit, without previously determining the priorities of incumbrances or giving the usual or any time to redeem. Provided, that if such request be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court for the purpose of securing the performance of such terms as the court shall think fit to impose on the party making such request.

The Imperial statute 15 & 16 Vic. ch. 86 gives no absolute right to the parties to require a sale, but a power to the court to decree it, in any suit for foreclosure of the equity of redemption in any mortgaged property. The object of the act is to avoid the delay and expense occasioned by successive redemptions, and the court has a considerable discretion in applying its power;³ which it exercises with a view to the general benefit of the persons interested, without injury to any of them: a sale has been accordingly refused upon evidence, that the land was likely to increase in value, and would not fetch its value upon an immediate sale; so that if it were sold, injury would be done to the mortgagor and the *puisne* incum-

¹ *Robinson v. Byers*, 9 Grant, 572.

² 15 & 16 Vic. c. 86, s. 48.

³ 16 Beav. 374.

brancers.¹ The court has also expressed reluctance to order a sale, unless the complication be such that the common decree cannot be conveniently worked; and therefore² refused it in a case where there were three mortgages, and the sale was sought by the subsequent incumbrancers only. But a complicated state of affairs does not seem to have been since thought a necessary condition for the order of sale.³

A sale has been directed upon the petition of the insolvent mortgagor, and some of his creditors, after a decree by which the insolvent and his assignee had been foreclosed without any opportunity of redeeming; and where a *puisne* mortgagee, after buying up the rights of the assignee and of other incumbrancers, had contracted for a sale without the authority of the court.⁴

Orders 426, 428 and 429 of the Consolidated General Orders have been framed from this statute. Order 426 declares that, "Instead of foreclosure the bill in any mortgage suit may pray a sale of the mortgaged premises, and that any balance of the mortgage debt remaining due after such sale may be paid by the mortgagor, and the same may be decreed accordingly." Order 428 declares that "The Court may direct a sale of the property instead of a foreclosure of the equity of redemption, on such terms as the Court thinks fit; and, if the Court thinks fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem." And Order 429 directs that "If the request for a sale is made by a subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the party making the request is to deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court thinks fit to impose." And by Order 430 it is directed that "If before, or upon the deposit to obtain a sale being made, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect; and he is thereupon to notify the defendant of such election. The notice may be to the effect set forth in Schedule R." And Order 431 provides that "Upon the

¹ *Hurst v. Hurst*, 16 Beav. 372.

² *Hiorns v. Holton*, 16 Jur. 1077.

³ See *Bellamy v. Cockle*, 18 Jur. 445; *Wickham v. Nicholson*, 19 Beav. 38.

⁴ *Laslett v. Cliffe*, 2 Week. R. 536; 2 Sm. & G. 278.

plaintiff filing with the Registrar a note of such election, and proof of service of such notice, the defendant making the deposit is to be entitled to a return thereof."

The orders from which these are taken were not promulgated until 1853, and there was up to that time some difficulty in determining in what case a sale would be decreed. These removed the difficulty, but the remarks made by Blake, C., in *Meyers v. Harrison*¹ will be read with interest.

An order of 29th June, 1861, provides, "Where, upon a bill for foreclosure, a sale is asked for by a defendant, it shall be competent to the Court to require as a condition that the party asking the same shall conduct the sale at his own expense, dispensing in such case with a deposit, if the Court shall think fit."

This order does not appear in the Consolidated General Orders, but it is presumed to be in force under Order 2 of these orders. It was held under the order of June that it did not entitle a defendant to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without paying in the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the Court to grant the defendant that indulgence upon the consent of the plaintiff in cases where the plaintiff desired to bid at the sale.²

A subsequent encumbrancer is entitled to a sale upon the usual terms, where the plaintiff is an equitable mortgagee by deposit of title deeds, as well as where the mortgage is by deed.³

Where the decree is for sale of mortgaged premises the Court will not on default grant an order of foreclosure *ex parte*.⁴ On motion for a decree, Spragge, V.C., decided that infant defendants are not entitled, as a matter of course, to an enquiry as to whether a sale or foreclosure is most to their benefit, but that some ground must be shown, and he directed an affidavit to be filed.⁵ There appears to be some difference of opinion on this point—the general un-

¹ *Meyers v. Harrison*, 1 Grant, 449; decided in 1850.

² *Taylor v. Walker*, 8 Grant, 506.

³ *Kerr v. Bebes*, 12 Grant, 204.

⁴ *Garratt v. McDonald*, 1 Chamb. Rep. 335.

⁵ *Graham v. Davis*, 2 Chamb. Rep. 24.

derstanding in the profession being different from the view above expressed.¹ In this country a judgment creditor is entitled at his option to a decree either to sell or foreclose the estate of his debtor.²

In a later case, however, it was held that where the heirs of the mortgagor are infants and a foreclosure suit is instituted, the rule of the Court is to grant a reference, as of course, to enquire whether a foreclosure or sale is more for the benefit of the infants. But, if affidavits are filed to satisfy the Court, as to the proper decree, or if the guardian consents, the reference may be dispensed with.³ In a suit for the sale of mortgaged property it appeared that a mesne incumbrancer held a mortgage on other property of the mortgagor; the Court ordered an account to be taken of what was due on both securities, and in default a sale, but in the event of a sale taking place the premises would be conveyed to the purchaser relieved of any lien of such subsequent mortgagee.⁴

Where a second mortgage does not notice the first, and contains absolute covenants for title, but there is no allegation in the pleadings, and no other evidence than the mortgage thus affords that the mortgagor did not inform such second mortgagee of the first mortgage before the execution of the second, the Court will assume such to be the case so as to vest the equity of redemption in such second mortgagee under the Statute 4 & 5 William and Mary; ch. 16, sec. 3.⁵

The following are the provisions of the Statute referred to in this case :

It has been provided by statute,⁶ that if any person shall borrow any money, or for other voluntary consideration give or suffer any judgment, statute or recognizance, and shall afterwards borrow any other sum from any other person, or become indebted for other valuable consideration, and for securing repayment or discharge thereof, shall mortgage his, her or their lands or tenements, or any part thereof, to, or to any trustee for, the said second or other

¹ Note by Reporter to *Graham v. Davis*.

² *McMaster v. Noble*, 6 Grant, 581.

³ *Dudley v. Berczy*, 18 Grant, 141.

⁴ *Merritt v. Stephenson*, 7 Grant, 22.

⁵ *Meyers v. Harrison*, 1 Grant, 449.

⁶ 4 & 5 W. & M. c. 16, s. 2.

lender or creditor, and shall not give notice to the mortgagee or mortgagees of the said judgment, statute or recognizance, in writing under his, her or their hand or hands, before the execution of the mortgage or mortgages; unless the mortgagor or mortgagors, his, her or their heirs, upon notice in writing under the hands and seals of the mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, attested by two or more sufficient witnesses, of any such former judgment, statute or recognizance, shall within six months pay and discharge the same, and all interest and charges due thereon, and cause the same to be vacated or discharged by record; then all equity of redemption of the said lands and tenements, as against the mortgagee, his representatives or assigns, is taken away from the mortgagor, his representatives and assigns, and the former may hold the mortgaged property as against the latter for such estate and term therein as was granted and settled to the mortgagee, as fully as if the same had been purchased absolutely and without power of redemption. The like penalty has been attached in the case¹ of a mortgage by a mortgagor of the same lands or tenements, or any part thereof, which he has already mortgaged as a security for money lent, or which has otherwise accrued or become due, or for other valuable consideration (the former mortgage being in force and not discharged,) and without discovery of the former mortgage or mortgages, to the second or other mortgagee, in writing under the hand of the mortgagor. But the act expressly reserves² the right of redemption of subsequent mortgagees.

Prima facie a mortgagor is entitled to six months to pay amount of mortgage money; to induce the Court to exercise the discretion vested in them by the General Orders, of directing an immediate sale, or a sale at an earlier day, some special ground must be shewn.³

Where a suit is brought to enforce the sale of mortgaged property against the mortgagor and his assignee, the order for payment

¹ 4 & 5 W. & M. c. 16, s. 8.

² *Id.* s. 4.

³ *Rigney v. Fuller*, 4 Grant, 198. The order referred to is sec. 2 of Order 82, of June, 1853, which is similar to Order 428 of the Con. G. O.

of any balance of the mortgage debt which may remain due after such sale must be against the mortgagor, and not the assignee.¹

There was a diversity of opinion among the Judges of our Court on this point, which was finally settled by this case. The Order 32, of June, 1853, section 2, is the same in effect as No. 426 of the Consolidated Orders.

A mortgage contained a covenant that the mortgagee would release any portion of the mortgaged land which the mortgagor might sell during the continuation of the mortgage, upon payment of £200 for every acre to be released. An assignee of the mortgagor made a general payment upon the mortgage, and afterwards, upon selling a portion of the land, demanded a release therefor from an assignee of the mortgagee under the covenant contained in the original mortgage. *Held*, that the benefit of this covenant would pass to an assignee of the equity of redemption, but the mortgagor or his assignee could not claim a release from the mortgagee, unless the latter received the stipulated amount per acre upon the sale of the particular portion of the land required to be released: no general payment by a mortgagor on the mortgage would be sufficient.²

When a mortgagor becomes Insolvent, the mortgagee is not compelled to go in under the Insolvency Act of 1864. Per *Mowat*, V. C., "A mortgagee is not obliged to file a claim, but is at liberty in lieu thereof, to exercise the power of sale contained in his mortgage."³

The chartered Banks of this province have a right to a decree of foreclosure upon a mortgage held by them as security.⁴

It may here be mentioned that the Court, where it is considered beneficial to the interests of an infant defendant, will direct a sale instead of a foreclosure, without requiring any deposit to cover the expense of such sale.⁵ In a subsequent case a sale was

1 *Turnbull v. Symmonds*, 6 Grant, 615.

2 *Webber v. O'Neil*, 10 Grant, 440.

3 *Gordon v. Boss*, 11 Grant, 124.

4 *Bank of Upper Canada v. Scott*, 6 Grant, 451.

5 *Bank of Upper Canada v. Scott*, 6 Grant, 451.

ordered without requiring a deposit, in a suit for foreclosure.¹ It must appear clearly that the Master reports a sale to be beneficial for infants before a final order for sale will be made.² On a motion for a decree V. C. Spragge decided that infant defendants are not entitled, as a matter of course, to an enquiry as to whether a sale or foreclosure is most to their benefit, but that some grounds must be shewn; and he directed an affidavit to be filed.³ But in a subsequent case it was held that where the heirs of the mortgagor are infants, and a foreclosure suit is instituted, the rule of the Court is to grant a reference, as of course, to enquire whether a foreclosure or sale is more for the benefit of the infants; but if affidavits are filed to satisfy the Court as to the proper decree, or if the guardian consents, the reference may be dispensed with.⁴ After a decree for foreclosure, the defendant applied in Chambers for an order for sale, the property mortgaged being worth \$1000, and the mortgage being for \$157; and that the usual deposit might be dispensed with. The Secretary considered the General Order imperative, and refused the application.⁵

Before the passing of the statute of 15 & 16 Vic. ch. 86 the Court of Chancery in England had power in certain cases to sell incumbered estates; and the mode of applying the statutory power being limited by the terms of the act, and the power itself being to a great extent discretionary, it becomes necessary to consider, in what cases, and to what extent, a sale of incumbered property may be decreed in equity independently of the statutory power.

The strict right of the legal mortgagee is foreclosure; and, independently of the statute, he had no general right to a sale,⁶ although, in particular cases, he is entitled to that relief.

The rights of the equitable mortgagee are less clear; for there has been some difference of opinion as to the effect, in this particular, of mortgages by deposit of title deeds. The principal has, however, been laid down, that where the equitable security is of such a kind,

¹ *Lawrason v. Fitzgerald*, 9 Grant, 871.

² *Edwards v. Burling*, 2 Cham. R. 48.

³ *Graham v. Davis*, 2 Cham. R. 24.

⁴ *Dudley v. Berczy*, 18 Grant, 141.

⁵ *Thompson v. Macculay*, 8 Cham. R. 111.

⁶ 1 Hare, 410.

as to entitle its holder to call for a complete legal security,¹ there the mortgagee's remedy ought to correspond as nearly as may be with that of a legal mortgage, and the decree should be for foreclosure. But where the equitable security is no more than a charge or lien upon the estate, the only proper relief is by sale.²

Now a right to foreclosure clearly belongs to the mortgagee of the equity of redemption, who is entitled to this relief as against the mortgagor and subsequent mortgagees, without redeeming the first mortgagee,³ subject to whose mortgage he has the best right to call for the legal estate. And it seems that upon the principle stated above the *puisne* mortgagee has no right to a sale.

The deposit of title deeds is also entitled to foreclosure, where the deposit is accompanied by an agreement to execute a legal mortgage.⁴ And it appears to be settled, that where this stipulation exists, foreclosure only may be had. It seems to be doubtful in practice whether the same right belongs to equitable mortgagees with a simple deposit or with a memorandum without an agreement to execute a mortgage; but it is submitted that such mortgagees are fully entitled to foreclosure, for it has been long held that they have a right to call for a mortgage, the deposit being evidence of itself of an agreement to make a legal security, which the court will carry into effect against the mortgagor or any who claim under him with actual or constructive notice of the deposit⁵ and several well-known forms of decree⁶ (one of which is said to have been penned by Lord Eldon himself) accordingly direct, that upon default in payment, the deposit shall be entitled to the premises free from all equity of redemption, and shall have an absolute conveyance executed by the depositor or owner of the equity of redemption.

1 *Parker v. Housefield*, 2 M. & K. 421; *Footner v. Sturgis*, 5 De G. & S. 736; *Jones v. Bailey*, 17 Beav. 582.

2 *Tipping v. Power*, 1 Hare, 405; *Footner v. Sturgis*, 5 De G. & S. 736; see *Toft v. Stephenson*, 7 Hare, 1.

3 3 Hare, 38; *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304.

4 *Perry v. Keane*, Coote, App. 582; *Pain v. Smith*, 2 M. & K. 418; *Moore v. Perry*, 19 Jur. 126; *Jones v. Bailey*, 17 Beav. 582; *Coz v. Toole*, 20 Beav. 145; see also *Frail v. Ellis*, 16 Beav. 351.

5 *Featherstone v. Fenwick*, cited 1 Bro. C. C. 269, n. 1784; *Harford v. Carpenter*, 1785; cited 1 Bro. C. C. 269, n.; *Birch v. Ellames*, 2 Anst. 428; *Ex parte Wright*, 19 Ves. 255. But the terms of the agreement may be such as to exclude the right to a legal mortgage; as where the intention of the deposit was held to be only to secure the deposit against any loss which he might sustain from joining as surety in a promissory note; and no liability having been incurred, he was entitled only to have the nature of the transaction and the purposes of the deposit reduced to writing. *Sporle v. Whayman*, 20 Beav. 607; 24 L. J. (Ch.) N. S. 789.

6 *Newton v. Aldous*, and other cases cited 2 M. & K. 421; and *Set. Dec.* 211, ed. 2; and see *Birch v. Ellames*, 2 Anst. 428; *Parker v. Housefield*, 2 M. & K. 419; *Tylee v. Webb*, 6 Beav. 562.

In opposition to this view, several *dicta* and decisions are cited by a late eminent writer.¹ One of the former, by Lord Cottenham, is but the expression of a shadow of a doubt.² In another,³ the same learned judge is reported to have said, "What right has an equitable mortgagee by deposit of deeds to ask for a legal mortgage?" And this, Mr. Spence remarks, was cited, without observation, by Sir L. Shadwell, V. C. E.⁴ But this fact does not show that the latter learned judge meant to express an opinion, that a depositor had no right to foreclosure. It seems clear, that he did not consider this right to be founded upon the right to call for a legal mortgage; for immediately before citing Lord Cottenham, he said that the equitable mortgagee had no right even to require an assignment, adding, "he may file a bill for foreclosure, according to some authorities, or for a sale according to others."⁵ And it has to be observed, that Lord Cottenham, in citing the decrees for foreclosure above referred to though he only decided the collateral question as to the equitable mortgagee's right to six months' time to redeem upon sale, expressed no doubt as to his right to foreclosure; but, on the contrary, dwelt strongly upon his title to remedies, corresponding as nearly as possible to those of the legal mortgagee.⁶

But whatever may have been Lord Cottenham's view, the *dictum* in question appears to be completely met by the authority of Lord St. Leonards, who, speaking of a deposit with a memorandum, merely expressing the purpose of the deposit, observed, "How can it be said in a court of equity, that he who has an equitable mortgage, and is entitled at any moment to file a bill to clothe himself with the legal estate, has not such a right under this enactment as enables him to sustain the present suit?"⁷ It may be observed, that the remark of Sir. J. Wigram, upon which Mr. Spence also relies, that the owner of an equitable lien has no right but by sale,⁸ was not made in a suit for foreclosure, but on behalf of creditors; neither does the word "lien" express with much accuracy, the effect of a

1 2 Spence, Eq. Jur. 792, n.

2 In *Price v. Carver*, 3 M. & C. 161.

3 In *Metcalf v. Archbishop of York*, 1 Myl. & Cr. 657.

4 In *Moore v. Choat*, 8 Sim. 616.

5 8 Sim. 615.

6 See *Parker v. Housefield*, 2 M. & K. 419.

7 See *Malone v. Geraghty*, 3 Dru. & War. 246.

8 In *Tipping v. Power*, 1 Hare, 410.

deposit of deeds by way of equitable mortgage. In the cases ¹ in which decrees for sale were made by the same learned judge, it does not appear that the question was discussed; and even admitting the tendency of Sir. J. Wigram's opinion to have been in favour of sale, and not of foreclosure, as the proper remedy, these decrees do not show that the latter is improper. It is not contended, that foreclosure is the only proper remedy; for it is clear, that mere deposites of deeds have been long held entitled to a decree for sale, and that the relief may ² be had against the mortgagor himself or his assignees; and not, as sometimes it seems to have been thought, against the representatives only after his death.³ It is submitted, therefore, first, that it is not settled that a mortgagee by a simple deposit is only entitled to a sale. It would seem rather that by the practice of the court, and, perhaps, also, upon the principles upon which equitable mortgages stand, he is entitled to foreclosure or sale at his option; to the latter by virtue of his equitable charge, and to the former upon the strength of his implied contract for a legal security. But secondly, where there is an express contract of that kind, there will be no decree for sale, but for foreclosure only, unless the contract be for a mortgage with power of sale, for then there may be a decree for sale;⁴ though such an agreement or power will not affect the right of foreclosure.⁵ But there can be no sale in respect of a parol agreement to deposit a deed, as such a contract does not amount to an equitable mortgage.⁶

It seems that the legal or equitable mortgagee has a general right to a sale, where the security is, or is thought to be, scanty;⁷ it is clear, that he may have this relief if he file his bill after the mortgagor's death, stating that the personal estate is deficient; and if the real and personal estate be represented by one person, it is not necessary to pray for an account of the personalty in the first in-

1 *King v. Leach*, 2 Hare, 67; *Jordan v. Jones*, 2 Ph. 170; *Whitworth v. Gaugain*, 1 Ph. 720; 3 Hare 416.

2 *Meaux v. Ferne*; *Spring v. Allen*, cited 2 M. & K. 422; *Russel v. Russel*, 1 Bro. C. C. 289; *Meller v. Woods*, 1 Keen, 16; *Patn v. Smith*, 2 M. & K. 417; *King v. Leach*, 2 Hare, 67; and see 3 M. & C. 161; *Prescott v. Tyler*, 1 Jur. 470; *Tipping v. Power*, 1 Hare, 406.

3 *Brookhurst v. Jessop*, 7 Sim. 438; 2 Y. & C. 730.

4 *Lister v. Turner*, 5 Hare, 281.

5 *Perry v. Keane, Coote*, App. 682.

6 *Ex parte Coombe*, 4 Mad. 249.

7 Per Lord Hardwicke, 3 Sw. 208, n., *Wiseman v. Carbonell*, where, although there was a bankruptcy, the sale was upon a bill in equity, the security being "deficient;" 1 Eq. Ca. Abr. 312. The general right, where the security is scanty, is perhaps not quite clear. In *Dashwood v. Bithazey*, Mos. 196, a sale was asked because the security was "defective;" by which it has been thought an imperfect and not a deficient security was meant; but the context, it is submitted, rather shows that the word was used in the latter sense, and the authority of Lord Hardwicke is not to be lightly passed over.

stance.¹ But it seems that where a sale was desired in a foreclosure suit on account of a defective security, it was necessary to file a supplemental bill,² unless the original bill were taken *pro confesso*, when the decree is according to the statements, without reference to the prayer.³

Although the "sales" referred to now are sales under the decree of the court, it may be well to introduce here an important decision in our own court, where it was stated that it is the settled rule of equity that a mortgagee in exercising a power of sale must take reasonable means of preventing a sacrifice of the property; hence, where a mortgagee took no means whatever for that purpose, and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside.⁴

In another similar case⁵ it was held that a mortgagee, when acting under a power of sale contained in his security, it not at liberty to proceed without any reference to the interests of the mortgagor. The mortgagee in such circumstances is in fact a trustee for the mortgagor, subject to his own claim upon the mortgaged estate. Where, therefore, the assignee of a mortgage with power to sell or lease the mortgaged premises, in default of payment of the amount remaining due upon the security, did not give any public notice of the intended sale, either through the newspapers, or by posting bills, notwithstanding which, and the protest of the mortgagee who had covenanted to make good any deficiency in case of a sale being enforced, the holder of the security proceeded with the sale, and sold for a sum little more than half the balance remaining due to a person cognizant of the facts, and then instituted proceedings against the mortgagee to enforce payment of the deficiency, upon a bill filed by the mortgagee praying a declaration that he was discharged by reason of the conduct of the holder of the security, and for an injunction to restrain proceedings at law, or in the alternative, to set aside the sale, the court set aside the sale, but refused the plaintiff his costs, he having made several charges of fraud and

¹ *Daniel v. Skipwith*, 2 Bro. C. C. 164.

² *Nesworthy v. Maynard*, cited Mos. 196.

³ *Dashwood v. Bithazey*, Mos. 196; and see 88 Ord. May, 1845.

⁴ *Latch v. Furlong*, 12 Grant, 308.

⁵ *Richmond v. Evans*, 8 Grant, 508.

collusion against the defendants, which the evidence showed were wholly unfounded.¹

Where the prayer of the bill is in the alternative for either sale or foreclosure the court will at the instance of the plaintiff make a decree for sale, and in the event of a sale failing to produce sufficient to cover the claim of the plaintiff order foreclosure.² *Per Spagge, V.C.*, "I have spoken with my brother *Esten*, and we are both of opinion that when the prayer of the bill is framed as here, no objection can reasonably be made to a decree for the alternative relief, in case the sale fail to realize sufficient to cover the amount found due the plaintiff for principal, interest and costs." In the Bank of U.C. v. *Scott*,³ *Blake C.*, said: "But since the recent order of this court, which follows the Imperial Statute (15 & 16 Vic., ch. 86) the power to direct a sale, without the consent of the mortgagee cannot be denied; and speaking for myself I have no doubt that the power there conferred ought to be exercised in favor of an infant defendant, whenever it can be made to appear that a sale would be for his benefit."

The mortgagee of a reversion⁴ was also entitled to a sale, on account of the unproductiveness of the security; and it is probably for the same reason, that this is the proper relief for the mortgagee of an adowson,⁵ who, however, may also have foreclosure.⁶

It was also the practice in the case of an infant heir or devisee of the equity of redemption,⁷ where it was more beneficial for the infant (and in an earlier case it was said to be proper),⁸ to direct a sale for payment of debts instead of foreclosure, because a sale would bind the infant, but a foreclosure would entitle him to a day to show cause against the decree after he came of age; but before the act of 11 Geo. 4 and 1 Will. 4, ch. 47, this could only be done by the mortgagee's consent,⁹ and after it by consent only, in a foreclosure suit,¹⁰ until the passing of 15 & 16 Vict. c. 86.

¹ *Richmond v. Hoare*, 8 Grant, 508.

² *Blackford v. Oliver*, 8 Grant, 391.

³ 6 Grant, 451; decided in 1853.

⁴ *Hou v. Vigurs*, 1 Ch. R. 18 (33, ed. 3).

⁵ *Mackenzie v. Robinson*, 3 Atk. 559.

⁶ *Gardiner v. Griffith*, 2 P. W. 403; see 3 Atk. 559; *Long v. Storie*, 3 De G. & S. 308.

⁷ *Davis v. Dowding*, 2 Keen, 245; *Scholesfield v. Heafield*, 7 Sim. 667.

⁸ *Booth v. Rich*, 1 Vern. 295.

⁹ *Monday v. Monday*, 1 Ves & B. 223.

¹⁰ *Farrow v. Rees*, 4 Beav. 26.

The circumstance that the mortgagor acquired an interest in the security, was held to be a reason, both for decreeing a sale, and for making it improper to foreclose. An instance of this was where the mortgagor was one of the mortgagee's executors; and where this happens, if it be apprehended that the mortgagor is insolvent, the other executors should file a bill for a sale.¹

The assignee under the insolvency of the mortgagor had no right to pray for a sale of the mortgaged estates in a suit for redemption of the several incumbrancers.²

A power of sale in a mortgage does not affect the right of foreclosure.³ But a conveyance, charging an estate with a sum of money and interest, and subject thereto in trust for a person therein named, with a power enabling the person, in whose favor the charge was made, to sell, on default in payment after notice, gives no right of foreclosure, there being no condition upon which a breach of forfeiture can arise;⁴ nor can there be a foreclosure, for the same reason, upon a mere trust for sale in favor of the creditor, though there be added covenants for repayment of the debt and interest, and for title, where they are in accordance with the trust.⁵ The proper relief in suits to realize such securities is a sale.

It is clear that the mortgagee of stock, and of personal chattels,⁶ is entitled without any express power in his security, to sell the mortgaged property upon giving notice, but subject to the liability to account for the moneys received on the sale, and, after satisfaction of the principal and interest, to pay the residue of the produce, and to transfer the unsold stock to the mortgagor;⁷ and that he is not obliged to come to the court for foreclosure; although he has a right to that relief also. And where the security is a reversionary interest in stock, there is also a right to foreclose, even with an express

¹ *Lucas v. Seale*, 2 Atk. 56.

² *Chappell v. Rees*, 1 De G., M. & G. 393.

³ See *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 9 Hare, 62. Mortgagee with power of sale filing bill to foreclose not directed on motion to sell. MS. Sir J. Leach, April, 1818, in 1 Mad. Ch. Pr. ed. 3, 668. The italics seem to show that the right to foreclose was not then thought to be altogether unaffected by the power of sale.

⁴ *Sampson v. Pattison*, 1 Hare, 538; see *Watson v. Waltham*, 2 Ad. & E. 485.

⁵ *Jenkin v. Row*, 5 De G. & S. 107; 16 Jur. 1131; and see *Ex parte Price*, 14 Jur. 53.

⁶ *Lockwood v. Ever*, 2 Atk. 308; *Kemp v. Westbrook*, 1 Ves. sen. 278; *Dyson v. Morris*, 1 Hare, 413; *Tucker v. Wilson*, 1 P. Wms. 280; 5 Bro. P. C. 193; where, however, the mortgagor had asked for a postponement of the sale.

⁷ *Harrison v. Hart*, 2 Eq. Ca. Abr. 6; Comyn's R. 395.

power of sale, though the mortgagee be not in possession of the legal interest; and he is not obliged to submit to a sale.¹ If a sale be desired, the mortgagee should pray for payment or sale, and the court will make the usual decree; upon which, if default be made, the sale will take place.²

The mortgagee of a policy of insurance is also entitled to a sale.³

Sale may be ordered⁴ where it is the proper remedy, though foreclosure only be prayed, and though there be no right to foreclosure; but upon a bill asking for a sale only, it was said⁵ that the plaintiff was not entitled to any other relief; which is probably true as a general proposition, foreclosure being an original and general, and sale a special right; but in the case last cited the mortgage was, for a term, with a trust for sale of the fee. Now, as such a security gave no right to a sale of the term, nor, it seems, to foreclosure of the fee (though the plaintiff contended for the latter relief), it seems to have been only meant, in the particular case, that on the general prayer for a sale there could be no foreclosure of the term; the opportunity of foreclosing which was accordingly given to the plaintiff by permission to amend his bill.

No sale can be made of a mortgaged estate as against a mortgagee with a paramount title without his express consent, unless it be made subject to the mortgage.⁶

¹ *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 9 Hare, 62.

² *Ponten v. Page*, 1 Mad. Ch. Pr. 664, ed. 3, V. C. Plumer, 1816.

³ *Dyson v. Morris*, 1 Hare, 413.

⁴ *Jenkin v. Row*, 5 De. G. & S. 110.

⁵ *Kerrick v. Saffery*, 7 Sim. 317.

⁶ *Langton v. Langton*, 19 Jur. 1073

CHAPTER XXX.

OF THE PROPER AND NECESSARY PARTIES.

SECTION 1.—*Of the Persons interested in the Equity of Redemption.*

Subject to certain exceptions created by orders of the Court of Chancery, and by statute the general rule concerning parties to suits in equity is, that all persons, who have an interest apparent on the record in the object of the suit, are necessary parties; and no person ought to be made a party who has not such an apparent interest.¹

Now the interests of parties to redemption and foreclosure suits arise either out of some right in the equity of redemption of the incumbered estate, or in the estate itself and the debt secured upon it in the hands of the mortgagee; and, as a general rule, all persons who have an interest either in the right of redemption, or in the security, must be joined; though the result may be the trial of a legal right, between parties thus brought before the court for a different purpose.²

In suits to foreclose the equity of redemption in mortgaged property, the judgment creditors of the mortgagee are necessary parties, but they may be added in the Master's office.³

Where there is only one principal and one surety, both must be made parties to a bill for foreclosure or sale. Where a mortgage is given by a surety on his own property, the principal is a necessary party to a suit for the foreclosure of the mortgage.⁴ Order 6 of the Orders of June, 1853, section 8, is similar to order 62 of the Consolidated General Orders.

¹ *Cabot on Parties*, 13—91.

² *Evans v. Jones*, Kay 39; and see *Spurgeon v. Collier*; 1 Eden, 56; where, on a bill to redeem, it became necessary to decide as to the voluntary character of a post-nuptial settlement.

³ *Sanderson v. Ince*, 7 Grant, 383; and see *Patterson v. Holland*, 8 Grant, 238; *Whan v. Lucas*, *Murney v. Pringle*, ——— v. *Courtney*, 1 Cham. R. 58; but now a judgment is not a lien, though *a. fa.* against lands is, and therefore none but *a. fa.* creditors are made parties in the Master's Office.

⁴ *Sedler v. Sheppard*, 12 Grant, 456.

Of the Mortgagor.

And, first, as to the mortgagor himself. He must be a party to every suit in which the question of redemption arises between mortgagees ; because, after giving liberty to the *puisne* mortgagee to redeem the first, the decree is, that the former, in his turn, may be redeemed by the mortgagor ; in default of which the latter shall be foreclosed. But if he be no party to the suit, his right of redemption will remain open, and the first mortgagee will be exposed to another suit.¹

The presence of the owner of the equity of redemption is also necessary, where part of the estate, which is subject to the first mortgage, is not comprised in the security of the second mortgagee, and even where the equity of redemption of the excluded part is no longer in the hands of the original mortgagor.² For the prior mortgagee must be redeemed entirely, or not at all ;³ and the subsequent mortgagee of part of the estate, upon paying off the whole debt in obedience to this rule, steps into the place of the other as mortgagee of the whole estate, and thereby, of necessity, acquires the right, and incurs the obligation, of bringing the owners of that estate before the court.

The rule is the same, where the mortgagee holds securities upon distinct estates, and even for distinct debts of the mortgagor, whether the securities be by the same or by different instruments, and whether redemption be sought by an incumbrancer, or by the owner of the equity of redemption of part of the mortgaged estate or of one of the estates separately mortgaged.⁴

And the mortgagor of another estate as a collateral security is a necessary party to a suit for foreclosure against the principal mortgagor by virtue of his right to redeem, and thereby to prevent his own estate from being burdened to a greater amount than the

1 *Fell v. Brown*, 2 Bro. C. C. 276 ; *Palk v. Clinton*, 12 Ves. 48 ; and see *Ramsbottom v. Wallis*, Coote on Mort. App. 578.

2 *Palk v. Clinton*, 12 Ves. 48.

3 *Palk v. Clinton* ; see also *Jones v. Smith*, 2 Ves. jun. 372, and cases there mentioned ; and *Thornycroft v. Crockett*, 2 H. L. C. 239.

4 *Ireson v. Denn*, 2 Cox, 425 ; *Cholmondeley v. Clinton*, 2 Jac. & W. 134 ; *Ex parte Carter*, Amb. 733.

estate of his principal is insufficient to satisfy.¹ But the surety is not a necessary party where, being bound by a personal covenant only, he has no security on the estate.²

But our Order 427 provides that "Where any person is surety for the payment of a mortgage debt, such person may be made a party to a suit for the sale of the mortgaged property, and the relief specified in Order (426,) may be prayed against both the mortgagor and his surety, and the same may be decreed accordingly."

A mortgagor conveyed part of the mortgaged property to a purchaser, the mortgagor covenanting against incumbrances; and the mortgagee subsequently released the part so sold from his mortgage. *Held*, that as this release was in accordance with the mortgagor's own obligation as to that part, it did not affect the mortgagee's right to recover the mortgage debt, or his lien on the rest of the mortgaged property.³

And where a mortgagee and mortgagor sell and convey part of the mortgaged property, without the concurrence of a person to whom subsequently to the mortgage, the mortgagor had sold the remainder of the property, and whose interest was known to the mortgagee, and the mortgagee covenanted for freedom from incumbrances. *Held*, that the mortgagee having thereby put it out of his power to reconvey the whole of the mortgaged property, he could not call on the owner of the remaining portion for payment of the balance of the mortgage money. This rule does not apply where the sale is under a power contained in the mortgage, or where the mortgage is of chattels which a mortgagee has a right to sell without any express power. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party. Where the mortgagee's right to claim a lien on the unsold portion has thus been put an end to, it is not revived by his two years afterwards obtaining the consent of the first purchaser to a reconveyance on payment of the mortgage money.⁴

¹ *Stokes v. Clendon*, 3 Sw. 150, n.

² *Newton v. Earl of Egmont*, 4 Sim. 574.

³ *Crawford v. Armour*, 13 Grant, 576.

⁴ *Gowland v. Garbutt*, 13 Grant, 578.

Order 439 provides that "Where a bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause." And Order 440, that "Where the plaintiff, prays a sale or foreclosure, subject to a prior mortgage, the prior mortgagee is not to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the bill."

Where there is only one principal and one surety both must be made parties to a bill for foreclosure or sale.¹

The mortgagor must also be a party to a suit, in which the validity of the mortgage is contested.²

If the estate of a married woman be mortgaged, and the right of redemption be reserved to her and her husband, or either of them, she must be made a party.³

When the wife of a mortgagor has joined in the mortgage to bar her dower in favour of the mortgagee, it is not improper to make her a party to a suit to foreclose the mortgage, although the conveyance contains no express limitation of the equity of redemption to her.⁴

But it was subsequently held that to a suit for the foreclosure of a mortgage, in which the wife of the mortgagor has joined to bar her dower, the wife is not a necessary party, and, if made a defendant, the bill as against her will be dismissed with costs.⁵

If the tenant for life of a mortgaged estate, mortgage his life interest for a term, if he shall so long live, with a power of sale, he is a necessary party to a bill for redemption of the original mortgage brought by a purchaser under the power of sale, notwithstanding the smallness of his interest; because the mortgage term was carved out of his interest in the equity of redemption.⁶

If the mortgagor have conveyed his equity to a subsequent mortgagee, the consideration for the sale being the amount due on the

¹ *Cockburn v. Gillespie*, 11 Grant, 465.

² *Thompson v. Baskerville*, 3 Rep. in Ch. 215.

³ *Hill v. Edmonds*, 5 De G. & S. 603.

⁴ *Saunderson v. Caston*, 1 Grant, 349.

⁵ *Moffatt v. Thompson*, 3 Grant, 111.

⁶ *Hunter v. Macleu*, 5 Hare, 238.

several mortgages, and payment thereof by the purchaser, the balance being applied to the discharge of the purchaser's own debt; and a clear intention be shown that he is to take the estate burdened with the debts, his own debt is destroyed; and he being in the place of the original mortgagor, may be foreclosed without the presence of the latter.¹

If the mortgagor or owner of the equity of redemption become bankrupt,² or insolvent,³ he should not generally be made a party; for his whole interest, and, therefore, his right of redemption, will be bound by a decree against his assignees, and if they release the equity he cannot redeem. And charges of fraud, not particularly directed to the matters upon which relief is sought, will not make the mortgagor a less improper party; nor will a general charge against several defendants (of whom he is one) of possession of documents.⁴ Such a charge will be referred to a possession by the defendants according to their rights and interests. And even if the insolvent, having been made a party, be not dismissed, he cannot appeal, though a right of redemption was given him by the decree, and though he allege that there is in fact a surplus.⁵

To a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party.⁶ Per *Blake, C.*: "Upon looking into the authorities, we are of opinion that the plaintiff has pursued a proper course in not making the bankrupt mortgagor a party; and that, according to the cases of *Collins v. Shirley*,⁷ *Singleton v. Cox*,⁸ *Cash v. Belcher*,⁹ and *Kerrick v. Saffery*,¹⁰ he is entitled to the reference asked for." To a suit brought by or against a trustee of an insolvent's estate in respect of a sum owing by one of the debtors of the insolvent, the creditors for whose benefit the trust deed was executed are not necessary parties.¹¹

1 *Brown v. Stead*, 5 Sim. 585.

2 *Kerrick v. Saffery*, 7 Sim. 317; *Lloyd v. Lander*, 5 Mad. 282.

3 *Collins v. Shirley*, 1 R. & M. 638.

4 *Lloyd v. Lander*, 5 Mad. 282; see *King v. Martin*, 2 Ves. jun. 641.

5 *Rockfort v. Battersby*, 14 Jur. 229.

6 *Torrance v. Winterbottom* 2 Grant, 487.

7 1 R. & M. 638.

8 4 Hare, 526.

9 1 Hare, 310.

10 7 Sim. 317.

11 *O'Connell v. Charles*, 2 Grant, 489.

P., being a debtor of the plaintiff, deposited with him certain mortgages to secure such indebtedness: the plaintiff filed a bill against the parties entitled to the equity of redemption of one of those mortgages for payment of the money due thereon, and praying in default foreclosure. The defendants, at the hearing, objected that P. was a necessary party, but the Court overruled the objection as it had not been taken by answer, and P. might be ordered to be made a party in the Master's office. *Mowat, V. C.*, overruled the objection, referring to the¹ fact of its not having been taken by the answer, and to General Order of June, 1861, for adding parties in the Master's office interested in the equity of redemption.*

The interest of an insolvent mortgagor is not, however, inconsistent with that of his assignee, who is in the nature of a trustee for the insolvent as to the surplus. His presence as a co-plaintiff was, therefore, not fatal to the suit even before the passing of 15 & 16 Vic. ch. 86, s. 49, which forbids dismissal for misjoinder only.²

And the bankrupt or insolvent may even be properly joined; for it seems that the right of redemption becomes revested in him upon the assignee's disclaimer: and if the disclaimer be after the filing of the bill the mortgagor will be properly added as a party.³

But the assignee's disclaimer must be absolute; for if it be coupled with an admission that the insolvent's estate is vested in them, this admission makes it necessary to bring the assignees to the hearing, and then it will be improper to join the bankrupt.⁴

And if the assignees refuse to proceed, and the creditors file a bill for redemption, the bankrupt it seems should be made a party.⁵

Of the Assignees of a Bankrupt or Insolvent Mortgagor.

The official or provisional and creditors' assignees, under the bankruptcy or insolvency of the mortgagor, are the proper parties to suits in respect of his interest, and he will be bound by decrees

1 *Jones v. Bank of Upper Canada*, 12 Grant, 429.

2 *Cashell v. Kelly*, 2 Dru. & War. 181; *Raferty v. King*, 1 Keen, 619; *Eades v. Harris*, 1 Y. & C. 234.

3 *Singleton v. Cox*, 4 Hare, 328.

4 *Collins v. Shirley*, 1 Russ. & M. 638, and 9 Sim. 390.

5 *Franklyn v. Fern*, Barn. 30-32.

against them.¹ But if they absolutely disclaim by answer and state their readiness to have released the equity, and that all the estate has been distributed, they should not be brought to the hearing; otherwise if, by the disclaimer, they admit having an interest in the estate.²

Nor should the assignees be joined in respect of an estate of which the equity of redemption was settled by the mortgagor for valuable consideration before his bankruptcy or insolvency.³

The assignee of an insolvent grantor of a rent-charge must be party to a bill for a receiver, though the object of the bill be only to affect the possession, and not the title of the estate.⁴

The assignees are proper parties to a redemption suit commenced by creditors of the bankrupt, in consequence of the refusal of the assignees themselves to sue, where the creditors make out a case which entitles them to file such a bill.⁵

If the mortgagor's insolvency be discovered after issue joined, the plaintiff will be permitted to withdraw his replication and amend by joining the assignees;⁶ and in such a case the bankrupt has been allowed to be retained;⁷ but the assignees must be joined.⁸

Upon the death of a provisional assignee, his successor may be joined merely by revivor.⁹ If the equity of redemption become vested in the crown by forfeiture, the Attorney-General should be joined.¹⁰

A mortgagor who has made a mortgage on lands in this province, and who afterwards becomes a bankrupt in England, is not a necessary party to a bill to foreclose by force of the Imperial Statute, 12 & 18 Vict. ch. 106, relating to bankruptcy.¹¹

1 *Hanson v. Preston*, 3 Y. & C. 229; *Cash v. Belscher*, 1 Hare, 310; *Peake v. Gibson*, 3 Russ. & M. 354; *Hill v. Edmonds*, 5 De G. & S. 608.

2 *Thompson v. Kendall*, 9 Sim. 397; *Collins v. Shirley*, 1 Russ. & M. 638; 9 Sim. 399.

3 *Steele v. Maunders*, 1 Coll. 535.

4 *Curtin v. Darcy*, 2 Jo. & Lat. 718.

5 *Franklyn v. Fern*, Barn. 30-32.

6 *Hanson v. Preston*, 3 Y. & C. 229.

7 It seems in consequence of some doubt as to the regularity of the bankruptcy.

8 *Wood v. Surr*, 19 Beav. 551.

9 *O'Brien v. Mahon*, 2 Jo. & Lat. 201; where revivor may now be effected by order, without bill, see 15 and 16 Vict. c. 86, s. 52.

10 *Lutwich v. Attorney-General*, cited by Lord Hardwicke, 2 Atk. 223; *Paulet v. Attorney-General*, Hard. 465.

11 *Goodhus v. Whitmore*, 7 U. C. L. J. 124.

Of the Assignees of the Mortgagor.

The application to those cases, in which the right of redemption has become the subject of settlement, of the general rule in equity, that it is sufficient to bring the first tenant in tail before the court, has long been recognized. The rule, established for convenience, is said to be founded upon the practice at law, whereby subsequent remainders might be barred by a recovery in which a subsequent remainderman was vouched, without prejudice to the intermediate remainders. But courts of equity have gone further in binding subsequent remainders in tail; and, by extending the rule, have avoided the necessity of giving every contingent remainderman a right to open the accounts, and thereby to render foreclosure all but impossible.¹

It has, therefore, been laid down, that it is enough to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person, then the tenant for life.²

But where there is an express life estate the remainderman must be joined.³

The tenant for life,⁴ if there be one, and the intermediate remaindermen for life,⁵ must be parties; and if the interests of the latter become vested pending the suit, they must be added as parties.

And if by the death, pending the suit, of the owner of the first estate of inheritance, that interest be determined, the owner of the next estate of inheritance, and of the interests prior to his, must be joined.

And so must owners of new interests acquired by the determination of a contingency, and which are not subject to destruction by a prior vested estate of inheritance.⁶

¹ *Lloyd v. Johns*, 9 Ves. 37.

² *Gifford v. Hort*, 1 Sch. & Lel. 408; *Roscarrick v. Barton*, 1 Ch. Ca. 218.

³ *Sutton v. Stone*, 2 Atk. 101.

⁴ *Reynoldson v. Perkins*, Amb. 564; see *Handcock v. Shaen*, Coll. P. C. 122.

⁵ *Chappell v. Rees*, 1 De G., M. & G. 398; *Gore v. Staupoole*, 1 Dow. 31.

⁶ *Lord Red.* 174.

If the tenant for life be made a party with the tenant in tail, and the latter release after the taking of the accounts, and the passing of the time fixed for redemption, a decree of foreclosure, made absolute against the tenant for life only, will still bind the contingent remainders; the release under such circumstances being equal to an absolute decree.¹

Where there are trustees to preserve contingent remainders, however many contingent limitations there may be, it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested; and all that come after will be bound by the decree, though not *in esse*; unless there be fraud and collusion between the trustees and the first owner of the inheritance.²

The presence of an infant tenant in tail will bind the inheritance as well as if he were adult.³

But a decree against the tenant for life only, when the tenant in tail, being out of the jurisdiction, is not made a party, will not bind him, though it seems such a decree may be had, if the plaintiff will take the risk of being compelled to account again.⁴

To what extent and in what cases the heirs of a Scotch entail, who enjoy indefeasible estates, are necessary parties to suits touching their interests as such heirs of entail, is a matter upon which it seems no rule has been laid down.⁵

If there be a mortgage for a term, with a trust for sale of the fee, the trustees, having a legal interest in the estate, are properly joined in the mortgagee's suit for a sale.⁶ But if the trustees have merely the equity of redemption upon trusts to sell and pay off the prior mortgage debt, and hold the surplus for the mortgagor, and the deed be without consideration, the trustees are not necessary parties to a suit by the mortgagee; because this is only a private arrangement made by the mortgagor for his own convenience, and

¹ *Reynoldson v. Perkins*, Amb. 564.

² *Hopkins v. Hopkins*, 1 Atk. 590; *Cholmondeley v. Clinton*, 2 Jac. & W. 138; *Pow. Mort.* 975, n. (q); and *Lord Red.* 174.

³ *Reynoldson v. Perkins*, Amb. 564.

⁴ *Fishwick v. Lowe*, 1 Cox, 411.

⁵ *Fordyce v. Bridges*, 2 Ph. 507.

⁶ *Horrick v. Saffery*, 1 Sim. 317.

the trustees are but agents, claiming by an instrument which may at any time be cancelled, and under which the mortgagee takes no interest.¹

The trustees of persons entitled beneficially under a settlement of a lease are not necessary parties to a suit for redemption, where the settlor, after the assignment to the trustees, has renewed in his own name, and has thereby acquired the whole legal estate.²

To a bill for foreclosure brought by the trustees to whom the mortgage had been executed for the benefit of certain creditors of the mortgagor, such creditors are not necessary parties.³ Per *Blake, C.*: "As to the objection for want of parties, we think the plaintiff entitled to succeed. The sole object of the proceeding is to realize the trust fund. The suit might have been sustained by the trustee alone."⁴

Where a mortgagor had conveyed his equity of redemption to the trustees of his marriage settlement in trust for his wife for life, remainder to his children; and a bill of foreclosure was filed after his death against the trustees and widow, to which bill the children, being infants, were not made parties; the court granted a decree containing the usual reference to enquire whether a sale or foreclosure would be more beneficial to the infants, and gave liberty to the Master to make the infants parties in his office if he should see fit.⁵ A mortgagee filed a bill of foreclosure against the mortgagor alone, and seven months after the final order of foreclosure had been pronounced, the mortgagor moved to set the order aside on the ground that several mesne incumbrancers had not been made parties either before decree, or in the Master's office. The application was refused with costs.⁶

Where the mortgagor and mortgagee of leaseholds concur in assigning part of the estate for the residue of the term at a rent, and, apparently, with the intention of making only an underlease, the assignee is not a proper party to a suit for foreclosure in respect

1 *Slade v. Rigg*, 8 Hare, 35; *Garrard v. Lord Lauderdale*, 3 Sim. 1.

2 *Malone v. Geraghty*, 3 D. & War 248-251.

3 *Fraser v. Sutherland*, 2 Grant, 442.

4 *Franco v. Franco*, 3 Ves. 75; *Mitford* 201, 5 ed.; *May v. Selby*, 1 Y. & C. C. C. 235.

5 *Dickson v. Drayton*, 11 Grant, 303.

6 *Cameron v. Lynes*, 1 Ch. R. 42.

of the equity of redemption,¹ and it was doubted if he were so in respect of the rent reserved.

The first,² or any subsequent³ mortgagee or incumbrancer, whether of a legal,⁴ or equitable⁵ estate, who files a bill for foreclosure or sale,⁶ must make every incumbrancer, whose security is subsequent to his own, a party to his suit; in order that their successive rights of redemption may be preserved. And if two estates be mortgaged, and the mortgagor afterwards mortgage the equity of redemption of one of them to a second mortgagee, and sell that of the other to a third person, the original mortgagee in foreclosing must bring forward both the second mortgagee and the purchaser; for he cannot foreclose either of the estates alone, each being equally liable to the debt. Nor will an allegation without proof, that such a purchaser is an assignee for valuable consideration, without notice of the mortgage, bind the second mortgagee, or deprive him of his right to insist upon the presence of the purchaser.⁷ But it seems it would be otherwise if the allegation were admitted or proved.

In the case of a statutory mortgage of tolls, which passes only a share of the tolls, bearing the same proportion to the whole thereof, as the money advanced by the mortgagee bears to the whole of the money borrowed, all the mortgagees, whether prior or subsequent, are necessary parties, inasmuch as one cannot sue for payment of the amount due to him without diminishing the fund out of which the others are intended to be paid; and he who takes possession must apply the tolls in payment of the interest of all the mortgagees *pari passu*.⁸

Of the Devisee and Heir of the Mortgagor.

The devisee, whether in trust⁹ or beneficially, of the mortgagor, is a necessary party in respect of so much of the equity of redemp-

¹ *Edwards v. Jones*, 1 Coll. 247.

² *Adams v. Paynter* 1 Coll. 530; *Tyles v. Webb*, 6 Beav. 552.

³ *Johnson v. Holdsworth*, 1 Sim. N. S. 109.

⁴ *Adams v. Paynter*, supra.

⁵ *Tyles v. Webb*, supra.

⁶ *Burgess v. Sturges*, 14 Beav. 440; but see *Delabere v. Norwood*, 3 Sw. 414, n.

⁷ *Payne v. Compton*, 2 Y. & C. 457.

⁸ *Mellish v. Brooks*, 3 Beav. 22; *Watts v. Lord Eglington*, 15 L. J. (Ch.) N. S. 413.

⁹ *Coles v. Forrest*, 10 Beav. 552.

tion as has been devised to him ; and the heir,¹ in respect of what he takes by descent. Thus, if the whole equity be devised, the heir having no interest is not a proper party, either to a bill by the devisee to redeem² or by the mortgagee to foreclose.³ Nor should he be made a party to a suit by a devisee of the grantor, in a fraudulent conveyance to set it aside,⁴ because the equity of setting aside such a deed will pass by devise. But it may happen that both should be parties. As if one, claiming to be devisee of a mortgaged estate, seek as well to establish the will⁵ as to redeem ; or if his title as devisee be doubtful ;⁶ then the interest of the heir in disputing the will makes him a necessary party.

If the heir and devisee, by reason of a doubt arising upon the will, both claim, the devisee alone, it seems, should be plaintiff, and not both of them ; but the heir should be a defendant, for their claims are inconsistent. And the allegation of an agreement between them to divide the estate will not alter this ; because the existence and legality of such a contract cannot be assumed, and the parties must therefore be treated as if none such were in existence.⁷

And so if the mortgaged estate be devised subject to a rent charge, and the rent charge descend to the heir, he must be made a party with the devisee to the mortgagee's suit for foreclosure.⁸

To a suit to redeem by persons entitled under a will to a charge upon the equity of redemption, the trustees of the will are proper parties ;⁹ because they may have a claim upon the estate. But in a case where the possessor of the legal estate, and all the persons beneficially entitled, were before the court, and the interest of none of the parties to the record required the presence of the heir at law of the surviving trustee, he was held to be so far a formal party, that, the objection for want of parties not having been taken till the hearing,¹⁰ a decree was made in his absence, saving his rights.

¹ *Farmer v. Curtis*, 2 Sim. 466 ; *Fell v. Brown*, 2 Bro. C. C. 276.

² *Lewis v. Nangle*, 2 Ves. 480.

³ 2 Ch. Ca. 32.

⁴ *Uppington v. Bullen*, 2 Dru & War. 184.

⁵ *Lewis v. Nangle*, 2 Ves. 340.

⁶ *Earl of Macclesfield v. Fitton*, 1 Vern. 168.

⁷ *Cholmondeley v. Clinton*, 2 J. & W. 135 ; but see 15 & 16 Vict. c. 86, s. 49.

⁸ *Catoert*, 246.

⁹ *Faulkner v. Daniel*, 3 Hare, 213

¹⁰ 40th Order. August, 1841.

And legatees whose legacies are charged by the will of the mortgagor upon the mortgaged estate have an interest in the redemption, and are therefore necessary parties¹ to a suit in which that right is brought into question.

Of the Personal Representative of the Mortgagor.

The personal representative of the mortgagor is not generally a necessary party to a suit for foreclosure simply, or for redemption of a mortgage in fee, for he is neither interested in the accounts, nor entitled to redeem. And the possibility that the debt may have been paid is not a ground for making him a party to a simple foreclosure suit.² It is for the heir to prove any payment by the mortgagor or his executor, of which he claims the benefit, and the plaintiff is not bound to meddle with the personal estate, from which his remedy against the equity of redemption is quite distinct.

Where a bill by a mortgagee against the infant heir of the mortgagor prays a foreclosure, and the Court, for the protection of the infant, directs an enquiry whether a foreclosure or a sale is more for the benefit of the infant, it is not necessary to direct the Master to make the executor of the mortgagor a party in his office, in case of the Master's opinion being in favor of a sale.³

And so in a suit to enforce an equitable mortgage, it is not proper to bring forward the personal representatives of a deceased tenant for life of the mortgaged estate, merely because the defendants may have a right to reimburse themselves out of his assets, to the amount of arrears of interest accrued during his tenancy; ⁴ the plaintiffs not being bound to meddle with any adjustment of accounts between the persons interested in the equity of redemption.

If the executors raise money for payment of debts by way of further charge upon an estate already in mortgage⁵ the devisee seeking redemption on payment of the original mortgage only, need not make the executors parties in the first instance, if his claim does not recognize their interest, but leaves it to be brought forward in the defence.

¹ *Batchelor v. Middleton*, 6 Hare, 78.

² *Duncombe v. Halsey*, 3 P. W. 333, n. ; *Grace v. Lord Montmorris*, 2 Dru. & War. 432.

³ *Trust and Loan Company v. McDonell*, 12 Grant, 196.

⁴ *Wynne v. Styen*, 2 Fb. 305.

⁵ *Greenwood v. Rothwell*, 1 Beav. 279.

The personal representative of the mortgagor has no right of redemption in a term created out of the inheritance, for the purpose of making it a mortgage security,¹ and his presence is accordingly unnecessary upon foreclosure of such a term. But he is the proper party to a suit in respect of a mortgage of a subsisting term or other chattel interest.²

If the object of the suit be to obtain a sale either under a mortgage by way of trust³ for sale, or on the bill of an unpaid vendor of real estate⁴ or otherwise, or if the mortgagee pray for payment of any deficiency out of the personal estate of the mortgagor,⁵ the personal representatives of the latter are necessary parties, because they are interested in the produce of the sale, and in the taking of the accounts.

Also if it appear by the bill that the tenant for life have been in possession of the rents and profits, and have kept down the interest and made payments on account of the principal,⁶ his personal representative is a proper party to the suit as having an interest in seeing that the accounts are properly taken, and a possible right to stand to some extent as a creditor.

And so of the personal representative of a deceased subsequent incumbrancer ; as of an annuitant under the will of the mortgagor, whose annuity was in arrear.⁷

Persons who claim under the will of the mortgagor, charges on the equity of redemption, being entitled to have the real estate exonerated from the mortgage, out of the personalty,⁸ may also require the presence of the testator's personal representatives ; but in a case in which the mortgagor had been dead many years before the filing of the bill, and the mortgaged estate long treated as his only available property, an objection on account of the absence of the personal representatives taken for the first time at

¹ *Bradshaw v. Outram*, 13 Ves. 234 ; *Bampfild v. Vaughan*, Rep. t. Finch, 104.

² *Wilton v. Jones*, 2 Y. & C. C. C. 244.

³ *Christophers v. Sparks*, 2 Jac. & W. 229.

⁴ *Cave v. Cork*, 2 Y. & C. C. C. 130.

⁵ *Daniel v. Skipwith*, 2 Bro. C. C. 154.

⁶ *Cholmondeley v. Clinton*, 2 J. & W. 134 ; *Faulkner v. Daniel*, 3 Hare, 207.

⁷ *Hunt v. Fowles*, 9 Ves. 70.

⁸ *Faulkner v. Daniel*, 3 Hare, 213 ; but see 17 & 18 Vic. c. 113.

the hearing, was not allowed, but a decree was made saving the rights of the representative¹ in his absence.

And so to a suit for sale by the surviving partner of a firm, where a deceased partner and another, being joint owners of an estate, had deposited the title deeds with the firm as a security for a debt, against the surviving owner and the heir of the deceased partner,² the personal representative of the latter was held to be a necessary party to avoid circuity of suit; the personal estate being liable for the debt in exoneration of the descended realty.

If the equity of redemption have been dealt with by the mortgagor in his lifetime, so as to be converted into personalty, his personal and not his real representative will be the proper plaintiff in a redemption suit;³ and if the bill be brought by the heir, it seems that the defect will be incurable; it cannot be remedied by making the executor a co-plaintiff, for then there would be plaintiffs with conflicting interests;⁴ nor by making him a disclaiming defendant, because his disclaimer, after the filing the bill, will not sustain the suit of a plaintiff who had no interest at that time.

Where a person died, having created an equitable mortgage, with an agreement to execute a legal mortgage, and his administratrix renewed the lease, and gave the original mortgagee a legal security with a power of sale, she was held⁵ a necessary party in a suit to compel specific performance of a contract for sale under the power.

An administrator acting under letters of administration, limited to substantiate proceedings in the suit, and granted by the proper ecclesiastical court, sufficiently represents the intestate⁶ if the purposes of the suit do not require a general or more extensive representation.⁷

If the heir or person claiming under the mortgagor an interest in the equity of redemption be out of the jurisdiction, or his residence or existence be unknown, the cause must stand over till the

¹ 40th Order, August, 1841.

² *Scholesfield v. Heafield*, 7 Sim. 667; but see 17 & 18 Vic. c. 113.

³ *Griffiths v. Ricketts*, 7 Hare, 305.

⁴ But the court can now give relief, notwithstanding a conflict of interests in co-plaintiffs; 15 & 1 Vic. c. 86, s. 49.

⁵ *Sanders v. Richards*, 2 Coll. 56°.

⁶ *Faulkner v. Daniel*, 3 Hare, 208; *Davis v. Chanter*, 2 Ph. 545.

⁷ As in *Clough v. Dixon*, 10 Sim. 504.

defect arising from the want of parties can be remedied.¹ Unless the suit be of such a kind that the plaintiff can in his absence have proper and sufficient relief. As where the heir of the mortgagor of a term of years being absent, the owner of the legal interest of the first mortgagee of the term, who had also contracted to purchase the equity of redemption, was declared to be a trustee of the legal interest for the second mortgagee.²

If no heir can be found, the Attorney-General should be made a party.³

Of the Persons claiming Interests in the Security and Debt.

Of the Mortgagee.

No bill can properly be filed against the mortgagee, nor can he be properly made a party to a suit in respect of the mortgaged estate, unless there be an offer to redeem him, made by a person entitled to do so. And if there be no such offer the mortgagee may demur.⁴

Therefore one who has agreed to purchase an equity of redemption, having no right to redeem until the completion of the purchase (for he who claims a right to redeem must first have acquired the mortgagor's title to a re-conveyance)⁵ cannot make the mortgagee, either of a legal⁶ or equitable⁷ interest, a party to a suit to compel specific performance of a contract in which he has no concern, or the performance of which will not affect his security or interfere with his remedies. And on a bill⁸ by an alleged lessee against the lessor for discovery of the lease (which the defendant pleaded was invalid,) and containing a prayer, that the lessor might redeem a mortgage made by him, the mortgagee of this mortgage was held on demurrer, not to be a necessary party; probably, because the plaintiff's right to meddle with him depended upon the very question at issue in the suit, viz. the validity of the lease.

¹ *Fell v. Brown*, 2 Bro. C. C. 276; *Anderson v. Stather*, 2 Coll. 209; *Farmer v. Curtis*, 2 Sim. 468.

² *Hovew v. Wadham*, Ridg. Ca. temp. Hard. 201.

³ *Leahy v. Dancer*, 3 Mol. 108.

⁴ *Tasker v. Small*, 3 Myl. & Cr. 63; *Dalton v. Hayter*, 7 Beav. 319; *Inman v. Wearing*, 3 De G. & S. 729.

⁵ *Franklin v. Fern*, Barn. Ch. 30-32; *Bickley v. Dorrington*, and *Monk v. Pomfret*, cited there.

⁶ *Tasker v. Small*, *supra*.

⁷ *Hall v. Laver*, 3 Y. & C. 191.

⁸ *Hitchins v. Lauder*, Coop. 34.

But if the mortgagor's title be impeached by the bill, the mortgagee having a great interest in supporting it, and being often in possession of the deeds, ought to be joined.¹

If the mortgagee admit his interest, he may be joined, without any offer to redeem, in a suit to carry out the trusts of a deed to which he was not a party, and by means of which it is intended to exonerate the mortgaged estate from the debt by payment thereof out of other estates.² If, however, he claims no interest in such a suit, he must be careful to disclaim, and not to demur thereto, where the bill contains not merely a general allegation that the defendant is interested (which is not enough to prevent a demurrer),³ but an express denial that he has any interest in the estates, followed by allegation that he claims an interest the nature of which he ought to set forth ; for by demurring he would admit the charge, that he claims an interest, which makes his presence necessary.

Where a mortgagee has assigned the whole benefit of his security, having previously been in possession, and the mortgagor seeks an account of an overplus alleged to have been received, the mortgagee, notwithstanding his assignment, must be joined with the assignee, that he may account for what he received in his time.⁴ But if the mortgagor seeks only an account of what is due to the assignee, for the purpose of redemption, then, and it seems whether the mortgagor have or have not been a party to or had notice of the assignment, the mortgagee who has assigned need not be a party.⁵ In the latter case,⁶ because the assignee having agreed to stand in the place of the original mortgagee, is bound by all the equities subsisting between him and the mortgagor, and cannot afterwards object to accounts which he has already taken on the credit of the

¹ *Copis v. Middleton*, 2 Mad. 423.

² *Dalton v. Hayter*, 7 Beav. 313.

³ *Plumbe v. Plumbe*, 4 Y. & C. 345.

⁴ *S. N.* 2 Eq. Ca. Abr. 594, Duchy; *Freem. Ch. Ca.* a. 68. Said in Powell, 958, note (ns), to be overruled by *Chambers v. Goldwin*, 9 Ves. 260. But Lord Eldon's observations did not extend to the case put here, of a mortgagee in possession, and an account sought of the overplus received. Upon the principle of the case cited, was decided *Louther v. Carlton*, in which, according to the report in 2 Atk. 130, it was held, that if there have been several transfers of a mortgaged estate, a *putene* assignee who had notice of the mortgage may call for the presence of the *meane* assignee, who had no notice, or of his representatives, that he may avail himself of the shelter afforded by the title of the other. The case thus put is doubted by Mr. Calvert, and, in fact, bears internal evidence of error ; for it is stated that the very representatives were parties, in respect of whose absence the objection was taken. The report in Barn. Ch. 368, shows, that, although the question of notice really arose, the representatives were ordered to be joined, on the ground that they had been in possession, and that an account was sought of *meane* profits. The case is also reported, but not on the question of parties, in Ca. t. Talb. 187.

⁵ *Freem. Ch. Ca.* c. 68.

⁶ *Hill v. Adams*, 2 Atk. 39 ; *Norriah v. Marshall*, 5 Mad. 475 ; *Chambers v. Goldwin*, 9 Ves. 260.

assignor; and it seems upon principle in the former also, because the assignor's accounts have been admitted by both parties.¹

If only part of the security have been assigned to a derivative mortgagee, for a less sum than the original debt, then upon a suit for redemption or foreclosure, the original mortgagee must be a party; for he claims an interest, viz. a right to redeem the assignee, and prevent another account.² Yet if in such a case the objection of the absence of the original mortgagee be not taken until the hearing, the cause will be suffered to proceed without him, if being a witness, he have sworn that he is fully satisfied and retains no interest.³

Where there are several tenants in common or joint tenants of the mortgage money, all must be parties.⁴

The second or other *pusine* incumbrancers may foreclose those subsequent, without joining those prior to themselves;⁵ for the latter can suffer no damage. The subsequent mortgagees, it is true, are left without the opportunity of redeeming all who are prior to themselves in the same suit; which, however inconvenient, is not thought to be unjust towards those, who, lending money upon incumbered estates, have a full knowledge of the state of the security.

Nor are the owners of prior incumbrances necessary parties to suits for sale⁶ of the estate by subsequent mortgagees, the sale being made subject to those incumbrances.

And an exception, the consequence of the nature of the relief, may arise where a mortgagee can be redeemed as to part only of his security, which, it has been held, may be done by a remainderman, as against the second mortgagee of a charge on the estate

¹ Freeman's Ch. Ca. c. 66, n.; *Car v. Boutler*, id. c. 390. In the case of *Barker v. Kellett*, Freeman's Ch. Ca. c. 146, it is said, that to a redemption bill by the heir of the mortgagor against the assignee of the mortgage, seeking also discovery of what had been paid on the assignment, a demurrer to the discovery, and because the assignor was not a party, was allowed: for that he should not discover what he paid, and that if plaintiff would redeem he should pay what was due on the original mortgage. The reason does not justify the demurrer for want of parties, for the assignor's presence could not be required by the assignee, if the price of the redemption was to be the original debt, the assignee being clearly bound as to that. It seems that demurrers were formerly allowed in part. See *Lord Red.* 214.

² *Norriah v. Marshall*, 5 Mad. 475; *Robert v. Abbot*, 2 P. Wms. 642.

³ *Norriah v. Marshall*, *supra*.

⁴ *Vickers v. Cowell*, 1 Beav. 529.

⁵ *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304; and see 3 Hare, 38.

⁶ *Delabere v. Norwood*, 3 Sw. 144, n.

(made by a former tenant for life under a power,) and by him mortgaged with other property, on payment of so much only of the amount of the charge as, the amount of the principal of the first mortgage being deducted, was comprised in the second mortgagee's security. In such a case it was held,¹ that the prior mortgagee of the charge, as well as the personal representatives of the mortgagor, must be parties; the former as being interested in the amount comprised in the second mortgagee's security, and the latter in ascertaining whether the mortgagor had paid off any and what part of the charge in his lifetime.

If a receiver be prayed of the general proceeds of the estate, this being an interference with the interests of prior incumbrancers, will make their presence necessary.² And the prior incumbrancers must be parties, if they have joined with the mortgagor in appointing a receiver, who covenants to keep down the incumbrances, and to pay the surplus to the mortgagor, to a suit against the receiver by subsequent incumbrancers, for an account and injunction against payment of the surplus to the mortgagor; because the receiver is agent for, and stands in a fiduciary relation to, all the incumbrancers.³

Of the Assignees and Devisees of the Security and Debt.

The person in whom the legal interest in the security becomes vested, whether it be by the original mortgage,⁴ by assignment,⁵ or by devise,⁶ and though he be only a trustee⁷ for the persons entitled to the mortgage money, is a necessary party to a suit for redemption,⁸ or foreclosure.⁹ To the one that a reconveyance may be obtained, to the other for the same reason if the defendant should redeem, and in case of a decree for foreclosure, because the legal interest is to be protected by the decree.

And if the mortgagee have made an absolute conveyance with several limitations and remainders over, especially where the title

¹ *Lord Kensington v. Bousserie*, 16 Beav. 194; 19 Beav. 89.

² *Gibbon v. Strathmore*, V.C.E., cited *Calvert*, 16.

³ *Ford v. Rackham*, 17 Beav. 485.

⁴ *Wood v. Williams*, 4 Mad. 188.

⁵ *Wetherell v. Collins*, 3 Mad. 255.

⁶ *Wood v. Williams*, *Wetherell v. Collins*, supra, *Hichens v. Kelly*, 2 Sm. & G. 264.

⁷ *Osbourne v. Fallows*, 1 Russ. & M. 741.

⁸ *Wetherell v. Collins*, supra.

⁹ *Bartle v. Wilkin*, 8 Sim. 238; *Smith v. Chickaster*, 2 Dru. & War. 404.

to redemption depends upon equitable circumstances (as if the mortgage be of long standing,)¹ the first tenants in tail at least must be brought before the court.

The purchaser from a mortgagee under his power of sale is not a necessary party to a bill by the mortgagor against the mortgagee to recover the surplus purchase-money, and offering to confirm the sale.²

The rule also applies to trustees for the mortgagee in respect of their power to give discharges for the mortgage debt; and it renders necessary the presence of a trustee, who, having signified his resignation only, by a memorandum indorsed on a trust deed, has not been fully discharged from the trust by the appointment of a successor.³

The trustee of the legal interest in the security having no adverse rights, may properly be, and to save expense to the mortgagor ought⁴ to be, a co-plaintiff; though it has been thought a sufficient reason⁵ for making him a defendant, that he *might have refused* to be a plaintiff.

Persons with whom the mortgagee has dealt wrongfully for the produce of the mortgaged estate are proper parties to a redemption suit, as being in possession of the value of the converted part of the estate, though they no longer hold the property *in specie*.⁶

Of the Heir of the Mortgagee.

If the legal interest should descend, the heir of the mortgagee must be a party; and if the suit be for foreclosure, the mortgagee's executor, upon reviving, must join the heir. And this is by the same reason which makes a trustee of the legal interest a necessary party; for the heir is a trustee for the executor.⁷

The rule, however, of course does not extend, as the reason does not apply, to an heir who has not the legal interest; so that the

¹ *Yates v. Hambly*, 2 Atk. 237.

² *Minn v. Stant*, 15 Beav. 49.

³ *Adams v. Paynter*, 1 Coll. 530.

⁴ *Smith v. Chichester*, 2 Dru. & War. 404.

⁵ *Broune v. Lockhart*, 10 Sim. 426.

⁶ *Hood v. Easton* 20 Jur. 729. See the principle of this decision doubted, 20 Jur. 917.

⁷ *Scott v. Nicol*, 3 Russ. 476.

heir of a subsequent mortgagee need not be joined in a foreclosure suit by the prior mortgagee.¹

Where a mortgagee institutes proceedings to foreclose against the mortgagor, and the estate of a deceased *mesne* incumbrancer, the real representatives of such deceased incumbrancer are not necessary parties.²

Where a mortgage is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives, real or personal, of the deceased partner, are not necessary parties.³

The heirs of the deceased mortgagee, or the persons beneficially interested under his will, are not necessary parties to a suit where the executors of a deceased mortgagee filed a bill to foreclose.⁴ The bill in this case was filed by three persons, describing themselves to be executors and executrix of the mortgagee, against the mortgagor, who demurred on the ground that the parties entitled under the will, or by descent, to the legal estate in the mortgaged premises, were not made parties. But to a bill by a mortgagee, for a sale after the mortgagor's death, the personal representative of the mortgagor is a necessary party; though not to a bill of foreclosure.⁵

Where several tenants in common, and the husband of one of them, in order to secure a debt due by another of them, executed a mortgage which conveyed a life lease only to the mortgagee; and on default of paying the mortgage money the mortgagee had sued and obtained judgment and execution against all the mortgagors for the amount of the debt, and under the execution so obtained had sold the reversion, and the mortgage was thereby satisfied; but the purchaser went into possession during the lifetime of the mortgagee. *Held*, that the personal representative was a necessary party to a suit by the mortgagor for a re-conveyance of the mortgagee's life estate, and an account of the rents

1 *Whittle v. Halliday*, 4 Dru. & War. 267.

2 *Taylor v. Stead*, 1 Cham. R. 74; and see to the same effect *Grinshawe v. Parks*, 6 U. C. L. J. 142.

3 *Stephens v. Simpson*, 12 Grant, 498.

4 *Lawrence v. Humphries*, 11 Grant, 209.

5 *White v. Haight*, 11 Grant, 420.

and profits.¹ One of the defendants, the assignee of the mortgagee, by his answer stated that he was not interested in the mortgage, or at all events only by way of security, and that it belonged to A., and that he and B. had concurred in an assignment of it to B. *Held*, that A. and B. were necessary parties, and that, notwithstanding the defendant consented to withdraw his answer, a decree could not be made in their absence.²

And if the legal interest have been devised by the mortgagee, the heir is not a necessary party.³

Where the heir at law could not be found the suit stood over,⁴ that the Attorney-General might be made a party to represent the legal interest.

Of the Personal Representative of the Mortgagee.

The mortgage debt being part of the mortgagee's personal estate, the security belongs, in equity, to his personal representatives; for whom, upon the death of the mortgagee after forfeiture, the heir, though in by descent, is only a trustee.⁵ Having, therefore, a right to receive the money upon redemption and to hold the estate upon foreclosure,⁶ their presence becomes necessary in suits of both kinds. But with this exception, that in a suit to redeem a Welsh mortgage of long standing the court *excuses*⁷ their absence, leaving the parties to controvert the matter between themselves. And this practice is evidently not from any want of interest in the personal representatives, but out of indulgence to the plaintiff, who might otherwise, after many years, find redemption impossible.

If tenants in common be entitled to the mortgage-money the personal representatives of those who die must be joined.⁸ It is the same, though the persons entitled are in fact jointly interested as

1 *Nelson v. Robertson*, 1 Grant, 530.

2 *Vankleek v. Tyrrell*, 8 Grant, 321.

3 *Hov v. Vigues*, 1 Rep. in Ch. 32. In *Skipp v. Wyatt*, 1 Cox, 255, the heir was made a party by the devise to establish the will against him, and the plaintiff was ordered to pay the heir's costs, which it was said should not be thrown on the estate, because they arose from the mortgagee's act in disposing of the property. As a general rule, however, it is clear that the estate is liable to costs arising out of the lawful and reasonable dispositions of the mortgagee.

4 *Smith v. Bicknell*, 3 Ves. & B. 53, n.; and see *Casberd v. Attorney-General* 6 Price, 411.

5 *Ellis v. Guavas*, 2 Ch. Ca. 50; *Wynn v. Littleton*, id. 51.

6 *Freak v. Hearsay*, 1 Ch. Ca. 51.

7 Per Lord Hardwicke, *Longuet v. Soarsen*, 1 Ves. 408.

8 *Vickers v. Couell*, 1 Beav. 529.

trustees, if there be nothing in the deed to show that the representatives of the deceased mortgagee are not entitled (for which the fact that the debt appears by the deed to be trust money is not sufficient ;¹) because the right to money advanced by several persons jointly does not survive in equity.

So the personal representatives of the original mortgagee must be parties to the suit of his sub-mortgagee to foreclose the original mortgageor,² in respect of their right to redeem the sub-mortgagee.

And the personal representative of an unpaid vendor of real estate is a necessary party to a suit by the trustees of his personal estate for foreclosure ; and if one of the trustees, being also the sole executor die, the suit will abate as if he had been executor only, and not trustee ; consequently his executors also must be made parties.

Although the absence of the mortgagee's personal representative do not appear till the hearing, the suit will not be permitted to proceed without him.⁴ And, where in his absence the heir of the mortgagee obtained a decree for foreclosure, the estate was decreed⁵ to the personal representative upon his filing a bill for that purpose ; though it was said by Lord Chancellor Jeffries,⁶ that in such a case the heir might well say to the executor or administrator,—“ I will pay you the money and take the benefit of the foreclosure to myself,” in case the land were worth more than the money.

Of the persons beneficially interested, either in the Equity of Redemption or in the Security and Debt.

In all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, such trustees represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate ; and, in such cases, it is not necessary to make the persons beneficially interested under the

¹ *Vickers v. Cowell*, 1 Beav. 529.

² *Robert v. Abbot*, 2 P. Wms. 642.

³ *Cave v. Cork*, 2 Y. & C. C. 130.

⁴ *Meeker v. Tanton*, 2 Ch. Ca. 29.

⁵ *Gobe v. Carlisle*, cited 2 Vern. 67.

⁶ *Clerkson v. Bowyer*, 2 Vern. 67.

trusts parties to the suit, but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.¹ Before the passing of this statute, and the date of a modern order of court, which directed² that devisees in trust of real estates, having power to sell and give discharges for purchase-moneys, rents and profits, should represent the *cestuis que trustent* to the same extent as they are represented by executors or administrators in suits concerning personalty, it was a general rule, that all persons beneficially interested in the equity of redemption or in the mortgage money should be made parties to suits affecting their interests.

The extent to which the interests of *cestuis que trustent* may be represented by executors and administrators in suits concerning personalty is therefore, subject to the discretion of the court, declared by the statute to be the standard by which the representative powers of trustees of real or personal estate, however the trust may have been created, is to be measured ; and with regard to the subject of mortgages, it will be remembered that the executor or administrator is the proper person to sue and be sued in respect of securities on chattel interests, without the persons beneficially entitled.³

The effect of the statutory rule upon suits between mortgagor and mortgagee, relating to securities upon real estate, appears to be, that the *cestuis que trustent* will be well represented by the trustees, where the latter have complete power over the estate, or have under their control funds applicable to the purpose of redemption ; and the individual rights of redemption, which before the statute belonged to such *cestuis que trustent*, will, to the extent to which they are so represented, be taken away.

Thus in a suit for foreclosure⁴ against the absolute devisees of the equity of redemption in one moiety of the estate, and against the devisees in trust of the other moiety, being also the executors of the mortgagor, the *cestuis que trustent* of the second moiety were held not to be necessary parties ; because all the persons, who had

¹ 15 & 16 Vic. c. 56, s. 42, Rule 9.

² 30th Order, August, 1841.

³ *Willon v. Jones*, 2 Y. & C. C. C. 244.

⁴ *Salé v. Kilsen*, 17 Jur. 171 ; 3 De G., M. & G. 119.

control over the property out of which the debt was to be paid, were present.

And on the same principle a decree may be made for sale of a mortgaged estate in the absence of the *cestuis que trustent* of the equity of redemption, where the devisees in trust are also executors of the mortgagor.¹

The right of redemption of the *cestuis que trustent* of a *pusine* mortgage² will in like manner be bound if the trustees being themselves mortgagees, or taking the mortgage as executors, be alone made parties to the suit.

If, however, the devisees in trust of the estate be not executors of the mortgagor, it seems that the old rule will remain in force.³

And it is to be observed, that there is a distinction between cases arising under wills and those under settlements, viz. that in the latter the trustees of the persons entitled to redeem have not generally the control over any other than the settlement fund, and may therefore be without the means of redeeming; in such cases the court will not permit adult *cestuis que trustent* to be foreclosed,⁴ without an opportunity of redeeming, but will require⁵ either that they be made parties, or that an affidavit be produced to the effect that they have had notice of the proceedings, and do not object to the produced decree. The same principle applies to the case of a will, where the surviving trustees of the will having disclaimed, the mortgagor's estate is represented only by an infant heir.⁶ And where the equity of redemption is settled in trust for the mortgagor for life, with remainder to his children, and the children of such as should die, it seems that the mortgagor's infant grandchildren, whose parents are dead, as well as the representative of a deceased child, who has been a defendant, ought to be joined in a foreclosure suit.⁷ But if instead of the usual decree in such a suit, a sale be directed, and the money be ordered into court (such proceeding

¹ *Hanman v. Riley*, 9 Hare, App. xl.

² *Goldmid v. Stonehewer*, 9 Hare, App. xxxix.; 17 Jur. 190.

³ See *Coles v. Forrest*, 10 Beav. 557.

⁴ *Goldmid v. Stonehewer*, supra. So the case of *Calverley v. Phelp*, 6 Mad. 229, before the act, though there was a power for the parties to give receipts, which it was held only made the concurrence of the *cestuis que trustent* unnecessary in case of a sale.

⁵ *Tuder v. Morris*, 1 Sm. & Gif. 503.

⁶ *Young v. Ward*, 10 Hare, lix.

⁷ *Siffken v. Davis*, Kay, xxi. The observations of Wood, V. C., only referred directly to the representative of the deceased defendant; but his allusion to the rule in *Goldmid v. Stonehewer* seems to involve the point respecting the infants, which was also debated.

being shown to be beneficial to the infant,) the presence of these parties will be unnecessary.¹

The distinction above referred to appears to take out of the operation of the statute, as regards adult *cestuis que trustent*, all cases arising under wills, where the devisees in trust, not being also executors, have no fund applicable to the purposes of redemption.²

And even in the case of a settlement, if the *cestuis que trustent* be infants, or if their shares have been again settled, inasmuch as the infants and the trustees of the sub-settlements cannot be expected to be in a position to redeem, they will be well represented by the trustees of the original settlement.³

Where amongst the subsequent incumbrances on an estate, the subject of a foreclosure suit by the first mortgagee, there were eight mortgages made on the same day, in respect whereof only one right of redemption was given, and one of the eight mortgagees died, to whose estate there was a difficulty in getting representation, the suit was ordered to proceed without a representative.⁴

Where the mortgagor sues for redemption, and there is but a single mortgage which has passed by the will of, or by assignment, from the mortgagee, the *cestuis que trustent* under the will or settlement will probably be no longer necessary parties with their trustees.⁵

Where one of several *cestuis que trustent* of mortgage money sues for foreclosure, the others need not be parties with the trustees; a practice which is founded upon the principle, that for preventing a multiplicity of suits there shall be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the court.⁶ A later case, in which one of several persons entitled to

1 *Sigden v. Davis*, Kay xxi.

2 This position seems to be supported by a late decision of Stuart, V. C., in which he refused to allow a devisee of an equity of redemption of freehold to represent the persons beneficially interested: *Cropper v. Mellersh*, 19 Jur. 299; and the following cases, decided before the statute, appear to come within the distinction; *Anderson v. Stather*, 2 Coll. 209; *Wilton v. Jones*, 2 Y. & C. C. C. 244; *Coles v. Forrest*, 10 Beav. 557; *Drew v. Harman*, 5 Price, 319; *Whistler v. Webb*, Bunb. 53; *Henley v. Stone*, 3 Beav. 356.

3 *Goldsmid v. Stonehever*, 9 Hare, App. xxxix.

4 *Long v. Storie*, 23 L. J., (Ch.) N. S. 200. According to the report in Kay, (App. xliii.,) a creditor was appointed representative for the purpose of the suit.

5 See *Whetherell v. Collins*, 3 Mad. 256; *Osbourne v. Fallows* 1 Russ. & M. 741.

6 *Lowe v. Morgan*, 1 Bro. C. C. 368.

distinct shares of money laid out by a trustees in a single sum, having sued for an account, and foreclosure of a proportion of the security, without joining the other persons entitled, a decree was made according to the prayer,¹ has caused some perplexity; and the cases have been thought to be distinguishable² by the circumstance that in the case of *Lowe v. Morgan*, the *cestuis que trustent* were joint tenants of the money laid out in their trustees' names, but in the case of *Montgomerie v. Bath*, the mortgagees were tenants in severalty or in common; and it has been concluded, that one joint tenant of money so laid cannot foreclose without the concurrence of the other joint tenants, but that a tenant in severalty or in common, having money on the same mortgage and in the name of the same trustee as another person, may foreclose without making that other person a party.

But this distinction strikes at the design of the practice to avoid a multiplicity of suits; to which the borrower of money belonging to tenants in common must be exposed, if any one of them can sue him alone. The learned editor of Mr. Powell attempts to avoid this objection by the argument that there is a difference between splitting one mortgage into different sums belonging to several persons, and the case where several persons lend distinct sums on the same security, for, in the latter case, the mortgagor knows at the time of borrowing the money how many suits can be brought against him. But it does not appear by the report of *Montgomerie v. Bath*, that the mortgagor knew in what right the money belonged to the lenders. On the contrary, the security was made, and the debt was made payable to the trustees alone, and the trust was declared by a subsequent deed poll; and it is submitted with deference, that whether the money be a single sum advanced by joint tenants in the name of the trustee, or composed of distinct sums to which different persons are entitled in severalty,³ it is equally the practice not to disclose the trust on the face of the mortgage, but to make the trustee alone the mortgagee, and the person entitled to receive the money. The fact is, that the decision in question, although the *Reg. Lib.* is said not to show⁴ that it was made by consent, is dis-

¹ *Montgomerie v. Bath*, 3 Ves. 560.

² *Powell*, Mort. 964, n. (c.)

³ See *Jones v. Pugh*, 12 Sim. 470; 1 Ph. 96.

⁴ 1 Sim. & S. 425.

tinctly stated by the reporter to have been made without opposition at the hearing; and there will, consequently, be little difficulty in allowing Mr. Belt's opinion¹ of its incorrectness; especially as the doctrine of *Lowe v. Morgan* has been since judicially confirmed.²

The presence of the persons beneficially interested under a will is not necessary in a suit by the executor and trustee to recover money lent by him on mortgage, under a power of investment contained in the will, even though the will contain no power to give discharges for the mortgage moneys; because that power is implied by the nature of the trust.³

The court will not permit the representatives of a deceased trustee of a mortgage, or even the surviving trustees (at least where the original number has been much reduced), to redeem without the presence of some of the *cestuis que trustent*; lest the trustees should misapply the mortgage money. But the mortgagee would be safe upon such a redemption without the *cestuis que trustent*.⁴

If several of a body of trustees, where the *cestuis que trustent* are numerous and fluctuating, file a bill against the remainder of the trustees, and a purchaser claiming an absolute title under a power of sale in a mortgage, offering to confirm the sale, but claiming the benefit of it as against the mortgagee,⁵ so many at least of the *cestuis que trustent* for the time being, as have not consented to the suit, ought, under the practice hitherto pursued, to be made parties, their interests being inconsistent with those of the rest. But part of the consenting *cestuis que trustent* might, under the sanction of a majority of the whole body, represent the rest of the consenting parties, where the majority had a right to give a sanction to the transaction in question. It does not seem likely that in such cases, the presence of any less number of the *cestuis que trustent* would be sufficient under more recent enactments.

Before the passing of the statute now under consideration, it was necessary to join scheduled creditors under a deed of assignment for the benefit of creditors where they have executed the deed;⁶ but

1 1 Bro. C. C. 368, Mr. Belt's note.

2 *Pulmer v. Earl of Carlisle*, 1 Sim. & S. 423.

3 *Wood v. Harman*, 5 Mad. 368; and see *Locke v. Lomas*, 5 De G. & S. 326; 16 Jur. 614.

4 *Stansfield v. Hobson*, 15 Beav. 189.

5 See *Minn v. Stant*, 12 Beav. 190; 15 Beav. 49.

6 *Newton v. Earl of Egmont*, 4 Sim. 674; 5 Sim. 180; *Thomas v. Dunning*, 5 De G. & S. 618.

where the trustees have no interest distinct from such creditors, nor any duty but to get in and distribute the property, it is probable that the presence of the creditors will not now be required ; for it seems, that such creditors have not in themselves any right of redemption apart from the trustees.¹ But, where, besides redemption, the bill seeks a declaration as to the priorities of the plaintiff, and the other incumbrancers,² it is not easy to see how scheduled creditors (the doubt as to the amount of whose interests implies a contest between each of them and every other claimant on the estate,) can be adequately represented by the trustees.

A small number of scheduled creditors may, however, represent the rest³ in the suit, if the bill show a good reason for omitting the entire body, and show also that a proper choice has been made. It seems essential to such a choice, that no representing creditor should have any interest in the matter, in conflict with the interests of those whom he represents ; as, for instance, an interest in the equity of redemption, in addition to his right as a creditor under the deed of trust.

Scheduled creditors, who are not parties to the deed of trust, need not be parties to the suit.⁴

Cestuis que trustent, who have neither been parties nor privies to a mortgage security, by which the fund was invested in breach of trust, and who have not adopted the transaction, are not necessary parties to a foreclosure suit by the trustees.⁵ If, in such a case, the *cestuis que trustent* have adopted the transaction, it seems that they should be co-plaintiffs if made parties to the suit, which, however, would probably be now unnecessary.

The persons beneficially interested under a will are not necessary parties⁶ to a suit by an executor against his co-executor to realize a mortgage debt due from the latter to his testator.

1 *Troughton v. Binkes*, 6 Ves. 573.

2 *Newton v. Earl of Egmont*.

3 *Holland v. Baker*, 3 Hare, 68.

4 *Powell v. Wright*, 7 Beav. 444. See also as to joining scheduled creditors, *Gore v. Harris*, 15 Jur. 761; and see *Smart v. Bradstock*, 7 Beav. 500; *Doody v. Higgins*, 9 Hare, xxxii.; *Walwyn v. Coutts*, 3 Mer. 107; *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 Russ. & M. 461; *Law v. Bagwell*, 4 Dru. & W. 406.

5 *Allen v. Knight*, 5 Hare, 280.

6 *Peake v. Ledger*, 8 Hare, 313.

And it seems,¹ that *cestuis que trustent* under a will may be represented by the personal representative in a suit by an equitable mortgagee of the testator, to whom the representative has given a legal mortgage and power of sale, to enforce specific performance of a sale under the power.

If the trustee in whose name money is lent on mortgage be a solicitor, it being an ordinary part of his duty to lay out money for his clients, he is not bound² to discover the names of his *cestuis que trustent*, if he cannot do it without a breach of professional confidence, notwithstanding any inconvenience which may arise to the plaintiff from want of the information. For the liability to make the discovery may ruin the business of the solicitor; and the debtor would have an unfair hold upon his creditor, if the latter should happen to be a person who had forfeited his legal rights.

4. Of Assignees, *pendente lite*, of the Mortgagor and Mortgagee.

It is a rule which has been long recognized both in courts of law and equity, and which arises out of the maxim "*pendente lite nihil innovetur*," that he who purchases an interest in litigated property pending the suit, acquires for the purposes of the suit no right distinct from that of his assignor.³ The alienation neither gives any new, nor varies any existing rights; and the pendency of the suit is held to be sufficient notice to the purchaser, whose title is disregarded in all subsequent proceedings. And this rule being grounded upon the reason,⁴ that any person interested in the subject-matter of a cause, might otherwise harass the other parties to the suit by making occasions for the addition of new parties, is limited in its action to the particular suit pending which the assignment is made, and does not prevent the assignees from enforcing their rights in any other suit.

If, therefore, pending a suit for redemption, the equity of redemption be assigned by the mortgagor, the assignee will be bound.⁵ and *a fortiori* in a foreclosure suit, where the mortgagee is an active party.⁶

¹ *Sanders v. Richards*, 2 Coll. 568.

² *Jones v. Fugh*, 1 Ph. 96; *Harvey v. Clayton*, 2 Sw. 221, n.

³ *Co. Litt.* 102 b; *Metcalf v. Pulvertoft*, 2 V. & B. 200; *Bishop of Winchester v. Paine*, 11 Ves. 201.

⁴ *Metcalf v. Pulvertoft*, *supra*.

⁵ *Garth v. Ward*, 2 Atk. 175.

⁶ *Bishop of Winchester v. Paine*, *supra*.

The rule applies equally to assignments by the plaintiff and the defendant ; and as well to those which affect the whole equitable estate or interest in question in the suit, as those by which one of several parties assigns his or her separate interest.¹

Nor is it material, if after the assignment there be an abatement of the suit by the death of the assignor ; but the assignee may in like manner be disregarded when the suit is revived. For he cannot acquire by the death of the assignor any better title than he had before, but will be as much bound by the decree against the representative as he would have been if it had been against the assignor himself.²

The rule in question has, however, been stated, with a reservation, by Lord Redesdale, who says,³ "if the suit proceeds without disclosure of the fact ;" and where an assignment was made *pendente lite* by a redeeming mortgagor, it was held⁴ that the assignee was a necessary party, even though he consented to be bound at the hearing ; on the ground that the suit could not be prosecuted when the subject of it had been transferred to one who was not a party ; and that the defendant was called upon to combat a shadow, and not a real opponent. Sir L. Shadwell, V. C. E., is also reported to have declared,⁵ that if a second mortgagee assign his interest after filing a bill to redeem, the suit cannot be maintained. And in another case it was held,⁶ that in a suit by the first mortgagee of leaseholds to foreclose, assignments made by the plaintiff of her interest *pendente lite* were of such a nature that the case could not have gone on without the presence of the assignees. It is submitted that the cases cited⁷ by Lord Redesdale are no authority for the restriction which he places upon the rule, and that in fact the doctrine, as laid down by Sir W. Grant and Sir T. Plumer,

¹ *Eades v. Harris*, 1 Y. & C. C. 234.

² *Bishop of Winchester v. Paine*, 11 Ves. 197. But this seems to be doubted by Lord St. Leonards, who distrusts the case cited as a precedent, and intimates that the question will probably turn upon the *laches* of the plaintiff in reviving the suit. *Vendors and Purchasers*, 1046, 11th ed.

³ *Lord Red.* 73.

⁴ *Johnson v. Thomas*, 11 Beav. 501.

⁵ *Solomon v. Solomon*, 13 Sim. 517.

⁶ *Coles v. Forrest*, 10 Beav. 552. In this case the assignee and his mortgagee filed a supplemental bill, and the question was as to the costs of that proceeding, and only incidentally upon the point whether the suit could have proceeded without them. The cases cited upon the question of costs chiefly related to assignments prior to the suit.

⁷ *Metcalfe v. Pulvertoft*, 2 V. & B. 200 ; *Daly v. Kelly*, 4 Dow. 417. Lord Eldon in this case says, that "where there is an alienation pending the suit, though that would not prejudice the plaintiff, yet the alienee must be brought before the court ;" but he spoke on the assumption that the alienee had the legal estate, which depends on a different principle.

pre-suppose a disclosure of the assignment ; for how otherwise could any question of making the assignees parties have arisen ?

It does not appear by the reports that any of the authorities (with the single exception of the case of *Eades v. Harris*,) upon which the rule in question is founded, or the rule itself, were submitted to the learned judges by whom the cases under consideration were decided ; and considering the language used by Sir William Grant and Sir T. Plumer, it is difficult to understand the force of Lord Langdale's reasoning in the case of *Johnson v. Thomas*. It is distinctly laid down that equity takes no notice of an assignment *pendente lite*, for the purposes of that suit. "As to the litigating parties," says Sir William Grant, "it is as if no such title existed." How then could it be said, that the defendant was left to combat a shadow ? For all the purposes of the suit the mortgagor remains the substantial plaintiff, his assignment pending the suit, and *quoad* the other parties to it, being ineffectual. The mortgagee can sustain no injury ; for the assignee has no interest or right of redemption against him ; neither are the mortgagor's rights less liable to the decree in case one be made against him, than if there had been no assignment.¹

But where a legal interest passes by the assignment, the assignee's presence becomes necessary ; because although the legal interest will be bound in his hands, so as to make him a trustee for the person entitled under the decree, yet unless he be joined, he cannot be compelled to reconvey.²

Neither does the rule apply to a person who, like the assignee in insolvency of the mortgagor,³ being no voluntary purchaser, but appointed in an adverse proceeding against him, is not bound by a decree in a suit carried on in his absence.

¹ *Coles v. Forrest*, 10 Beav. 552 ; and see *Higgins v. Shaw*, 2 Dru. & War. 362 ; *Landon v. Morris*, 5 Sim. 247, 269 ; *Wood v. Surr*, 19 Beav. 551 ; *Masy v. Batwell*, 4 Dru. & War. 68-80 ; *M'Leod v. Annesley*, 16 Beav. 607. In the last case it was also intimated, that an incumbrancer *pendente lite* of an equitable interest may be bound in a suit relating to the trusts of a deed by rule 4 of 15 & 16 Vict. c. 86, s 42 ; which enables one of several *cestuis que trustent* to have a decree without serving the others. In the case of *Quarrell v. Beckford*, 1 Mad. 269, a decree was held not to bind assignees, *pendente lite*, who were not parties. The grounds of the decree do not appear, but there were questions of over-payment and collusion, and the foreclosure decree had not been made absolute. *Bishop of Winchester v. Paine*, 11 Ves. 199 ; *Barry v. Wrey*, 3 Russ. 466 ; and see *Higgins v. Shaw*, 2 Dru. & War. 362 ; *Masy v. Batwell*, 4 Dru. & War. 80. *Wood v. Surr*, 19 Beav. 551.

It should be observed, that the doctrine as to binding incumbrancers *pendente lite*, may have been affected by the statute 2 & 3 Vict. c. 11. It is evident, that where there was no actual notice, the rule arose out of the doctrine that *lis pendens* was notice to all the world.¹ Hence Sir William Grant remarks upon the hardship of the rule, upon persons who purchase without *actual* notice.² But by the statute above mentioned, no *lis pendens* is notice, unless the suit be registered; and unless the doctrine be held to stand independent of notice, it seems to follow that where there is no actual notice, the purchaser *pendente lite*, not being party to the suit, will not be bound, unless it be duly registered.³

If an assignee desire to bring himself forward in the suit he should file a supplemental bill.⁴ And he may in the same manner bring forward the assignees in insolvency of his immediate assignor. and of the person under whom the latter claims. But leave will not be given him on petition to take part in the suit.⁵

Nor is it proper for the assignee to file a new bill against the parties to the former suit, other than the assignor, after a decree to account. A bill by an assignee of a subsequent mortgage, against the parties to the former suit, praying the benefit of that suit, and the redemption of prior and foreclosure of subsequent mortgages was as against all but the assignor dismissed with costs.⁶

The assignee may be joined by a supplemental bill after a decree to account in the original suit.

It was intimated, but not decided by Lord Eldon, that a mesne incumbrancer *pendente lite*, who has not made himself a party, cannot be allowed to appeal.⁷

As the assignee *pendente lite* stands in the place of his assignor, he cannot raise an objection for want of parties, which could not have been raised by the assignor.⁸

¹ *Tothill*, 45; *Worsley v. Earl of Scarborough*, 3 Atk. 302.

² 11 Ves. 197; see *Landon v. Morris*, 5 Ninn. 247.

³ Note that in the late case of *Wood v. Surr*, 19 Beav. 551, there was actual notice.

⁴ *Foster v. Deacon*, 6 Mad. 59; *Coles v. Forrest*, 10 Beav. 552.

⁵ *Foster v. Deacon*, 6 Mad. 59.

⁶ *Booth v. Creswicke*, 8 Sim. 352.

⁷ *Daly v. Kelly*, 4 Dow. 435.

⁸ *Wood v. Surr*, 19 Beav. 551.

Where a bill for account and payment out of mortgaged estates seeks discovery of incumbrances prior to the plaintiff's, the defendant cannot take an objection on account of the absence of prior incumbrancers ;¹ because the subject of the objection is the very discovery sought by the bill for the purpose of making those persons parties.

An objection for want of parties will not be allowed to an amended bill, after one to an original bill which would have been an equally good defence against the latter ;² the defendant being bound to disclose all proper parties of whom he knows at first.

A plea that an incumbrance is now vested in an incumbrancer was held bad ; for at the filing of the bill it might have been vested in the plaintiff : and the plea should have shown that it was then in the incumbrancer.³

SECTION II.—*Proceedings to obtain Decree in cases of Foreclosure or Sales.*

Prior to the promulgation of the Consolidated Orders of 1868, there were different modes of obtaining decrees in mortgage cases. One, where no answer was filed, but there were subsequent incumbrancers to be made parties in the Master's office ; another, where no answer was filed, and there were no subsequent incumbrancers to be added ; another, where an answer was filed ; and others where the answer admitted such facts as entitled the plaintiff to a decree. In all these cases the decree was obtained in Toronto ; but there is now a fourth case, where the Deputy Registrars may issue decrees on *præcipe* for foreclosure, sale, or redemption, where the suit is between the original mortgagee and mortgagor only.

Order 38 provides that "Every Deputy Registrar may issue decrees on *præcipe* for foreclosure, sale, or redemption, where the suit is between the original mortgagee and mortgagor only, and is to enter such decrees in a book, to be approved of by the Court, and kept for that purpose by the Deputy Registrar."

¹ *Rawlins v. Dalton*, 3 Y. & C. 447.

² *Id.*

³ *Id.*

It may be well here to observe that, under this Order, the practitioner brings into the Deputy Registrar's office the certificates of the Registrar and Sheriff shewing that there are no incumbrancers, affidavit of claim, account, affidavit of service of the bill, and bill of costs. The Deputy Registrar takes the account as if he were acting as Master—taxes the costs, which are revised; and on receiving them from the revising officer, he prepares the decree which is subsequently worked like any similar decree issued in Toronto. It has been held that on taking the account in foreclosure suits, no more can be found due than the amount claimed by the endorsement on the copy of the bill served.¹

Before entering into the practice on a decree sent into the Master's office, it may be well to dispose of such cases as may be dealt with in the Registrar's office in Toronto. And first, as to the case where no answer is filed, but there are subsequent incumbrancers.

It will be recollected that in all suits for foreclosure or sale there must be endorsed on the office copy of the bill to be served the notice set out in Schedule S of the Orders. This notice is required by Order 486, which directs that "Where no answer is filed, the decree is to be drawn up upon production of an office copy of the bill, and an affidavit of the service thereof, shewing the same to have been endorsed with the notice set forth in Schedule S hereunder written." Order 487 provides that "The notice under Order 486 is to specify whether the plaintiff desires a foreclosure of the equity of redemption or a sale of the mortgaged premises." Before filing the bill the solicitor should obtain certificates (at as late a day as possible before filing), one from the registrar of the county in which the lands lie, another from the sheriff of the same county, shewing whether there are any incumbrancers either by deed or *fi. fa.* against lands.

If the decree be for a sale, these certificates must show every incumbrance (except prior mortgages), whether by deed or *fi. fa.*, both before and after the plaintiff's mortgage, up to the date of the bill being filed. But if the decree be for foreclosure, they are

¹ *Boyd v. Wilson*, 1 Cham. R. 268.

to show only the incumbrances subsequent to the plaintiff's mortgage. Assuming that the certificates disclose incumbrances, the plaintiff's solicitor, at the expiration of the time limited for answering, obtains from the Clerk of Records and Writs, or Deputy Registrar with whom the bill is filed, a certificate showing the date of the filing of the bill, the fact that no answer or demurrer has been filed, and the further fact that no note disputing the amount claimed by the plaintiff, as endorsed on the office copy of the bill, has been filed.

Mode of obtaining a Decree in such a case.—Take this certificate with the affidavit of service of the bill, and an office copy of the bill, to the Registrar, and he will give you the decree on *præcipe*.

The making of the decree in the Master's office will be considered further on.

But where no answer has been filed, and there are no incumbrancers, the practice is somewhat different.

Mode of obtaining a Decree in such a case.—Take the certificate of the Clerk of Records and Writs, or Deputy Registrar, that no answer, demurrer, or disputing note¹ has been filed, with the affidavit of service of the bill, and an office copy of the bill, to the Registrar; take also the mortgage deed, and the assignments thereof (if any), the affidavit of debt, and bill of costs, when the Registrar will, on *præcipe*, issue a decree in which the mortgage account will be taken, the costs taxed, and a time and place appointed for payment.

This decree, in addition to its qualities as a decree, has those of a Master's report.

The affidavit required before the Registrar should contain the matter required by Order 492, which provides that "Where the cause is heard upon an order to take the bill *pro confesso* in a suit for foreclosure or sale, and no reference as to incumbrances is required, the plaintiff is to produce at the hearing :

"I. The mortgage deed and the assignments thereof, if any.

¹ The note disputing the amount claimed by the plaintiff is usually called the "*disputing note*."

"II. An affidavit which is to state the amount advanced upon the security; the amount paid, whether by receipt of rents, or otherwise; and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them, have been in the occupation of the mortgagee, or of any one under whom he claims; and when there has been any such occupation the affidavit is to state its nature, the time it continued, and the fair rentable value of the property." And Order 483 provides that "Upon production of such proofs and documents, the Court may at once determine the amount due, and appoint the time and place for the payment of the mortgage money by the decree, without a reference to the Master, or any further enquiry."

Cases, however, sometimes arise where the bill contains matter beyond the usual statements necessary to obtain a common decree. If these statements are not answered, and there are no incumbrances, the plaintiff applies to have the bill noted to be taken *pro confesso*: this is done by producing to the Clerk of Records and Writs, or to the Deputy Registrar, the affidavit of service, and a *præcipe* to note the bill. The plaintiff then takes a certificate of the state of the cause to the Registrar, who will give him the decree as already described.

But where, in a foreclosure suit, an *interim* injunction had been granted to restrain the cutting of timber, it was held that the Registrar has no power to grant a decree on *præcipe*, containing a provision for continuing the injunction. For this purpose the cause must be brought on for hearing.¹ In a foreclosure suit, where the mortgagor is the only defendant, and an immediate decree is taken against him, by consent, without any reference or day of payment, a reference cannot be directed as to other incumbrancers not named in the bill.²

Order 495 provides that "Where the defendant answers the bill, admitting the execution of the mortgage and other facts, if any, entitling the plaintiff to a decree, or where the defendant dis-

¹ *King v. Freeman*, 1 Chamb. Rep. 350.

² *Taylor v. Ward*, 13 Grant, 590.

claims any interest in the mortgaged premises, or where no answer is put in to the bill, the plaintiff is, on *præcipe* to the registrar, to be entitled to such a decree as would under the practice of the court, been made upon the hearing of the cause *pro confesso*.

In any of these cases if there be no incumbrancers, the practice in obtaining the decree is the same as that just pointed out, but if there are incumbrancers, the practice will be the same as that pointed out in cases where there is no answer, but where there are incumbrancers.

In all these cases it has been assumed that no disputing note has been filed. If there has been one filed the certificate of the Clerk of Records and Writs or of the Deputy Registrar shall state the fact, but they in no way affect the getting at the decree excepting that four days' notice of settling it must be given to the party filing the note; and if there be a reference, he will be entitled to the same notice of the proceedings in the Master's office and elsewhere as he would be in case an answer had been filed.

The result of these orders is that in a suit for foreclosure or sale, the defendant is not to be noted in the office of the Clerk of Records and Writs, or of the Deputy Registrar as in default for want of answer, as pointed out by order 105; that order applying to other cases. If there be no answer, or if the answer admits the execution of the mortgage, and such other facts as entitle the plaintiff to a decree, or if the defendant disclaims, the plaintiff obtains his decree on *præcipe* in the manner already described. If the answer raises a defence, such as fraud, misrepresentation, or such an one as requires to be brought before the court at an examination and hearing term, the plaintiff must file his replication and go down to hearing in the usual way. If there be no incumbrancers the plaintiff gets his decree and report in one instrument as already mentioned: if there be incumbrancers, the decree refers the whole matter to a Master, before whom the proceedings on it will be decided in another place.

This is the practice when the plaintiff requires no special enquiries to be made; for instance, it is sometimes impossible for him to say, on considering the abstract, who is entitled to the equity

of redemption; in such a case he should suggest this in his bill, and ask for an enquiry before a Master as to the point. This will take the case out of the orders just mentioned, and whether there are or are not incumbrancers, the decree will refer the question to a Master, and the plaintiff will be entitled to all his costs.

It must however be understood that there is nothing to prevent the plaintiff from taking out the ordinary decree referring the whole case to a Master, even if there be no incumbrancers, and no special enquiries; but if this course be adopted he will, on taxation, lose all the costs, except those which he would have taxed had the account been taken before the Registrar in Toronto.

In *pro confesso* cases where the bill is for foreclosure or sale of mortgaged premises, and plaintiff asks for a decree and a reference as to other incumbrancers, as here, without being prepared with evidence to shew that there are other incumbrancers, he must pay the costs of the reference in case it shall appear to the Master that at the time of making the decree there were no incumbrances on the property other than the one in question in the cause.¹

The practice in obtaining a decree under Order 38, already referred to, is precisely similar to that already described where the Registrar has power to issue decrees on *proceipe*. The Order simply gives to the Deputy Registrar, in the cases mentioned, the same power, and no more, that the Registrar has. The plaintiff produces before the Deputy Registrar the ordinary affidavit of debt and his bill of costs; these must be revised, and if the defendant has filed a disputing note, he should be notified of the proceeding, not by warrant, but by notice from the plaintiff's solicitor.

There is, however, another case in which the practice in obtaining a decree is peculiar, and that is the case of a bill for foreclosure or sale filed against an infant heir, or infant devisee of the mortgagor—or against the infant heir or devisee of the assignee of a mortgagor. Order 434 declares that, "In an ordinary suit of foreclosure or sale against an infant heir or devisee of the mortgagor, or of the assignee of the mortgagor, where no defence is set up in the infant's

¹ *Hampden v. Howard*, 4 Grant, 681; and see *Burnside v. Lynn*, 4 Grant, 681, to the same effect.

answer, the cause is not to be set down to be heard in Court by way of motion for a decree; but after the infant's answer is filed, or after the time for filing the same, has expired, the plaintiff is to file affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to a decree, and is to apply for the decree in Chambers, upon notice to the infant's solicitor."

How to obtain this Decree:

Preface affidavits of execution of the mortgage and assignments, if any, and of the mortgage money being due—this latter is the same as that used in ordinary matters—and file them with the C. of R. & W. in Toronto. Give notice of their filing, and of your intention to apply, and at the time appointed the usual decree, referring the whole case to a Master, will issue.

This Order, however, applies simply to the plain cases mentioned in it; for if there be defendants other than those mentioned, the case would be taken out of it, and the plaintiff would proceed under the other Orders according to the nature of his case, regarding the infant defendant as a person who had only such a defence as is mentioned in Order 435, but who was entitled to notice of all the proceedings.

Before taking out the decree, the practitioner should have regard to Order 438. Until the Order of 29th June, 1861, it was a rule of pleading that all those interested in the equity of redemption, however numerous, should be parties to the bill. This was found to be an extremely inconvenient rule, especially in this country, where it frequently happens that a person buys a block of land, gives a mortgage on it, and subdivides it into a great number of lots, which he sells, often by a simple memorandum of agreement never registered, to as many different purchasers. The mortgagee, in endeavoring to enforce payment of his money, was compelled to ascertain the names of these various purchasers, and make them parties to his bill. This was frequently difficult to do, and to remedy the evil this Order was made; and it provides that, "Where it appears conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's

office, by reason of the parties so interested being numerous or otherwise,¹ the Court may direct that parties so interested be made parties in the Master's office upon such terms as to the Court seems fit; such order to be made only where one or more parties interested in the equity of redemption are already before the Court."

The case of *Jones v. Bank of Upper Canada*, referred to in the note, must be received with caution, as will be seen by the remarks of the Chancellor in *The Municipality of Oxford v. Bayley*.²

An order to make persons interested in the equity of redemption of mortgaged property parties to the suit in the Master's office will not be granted *ex parte*; notice should be served on the owners of the equity of redemption already before the Court, but not on those proposed to be added.³ Per Mowat, V.C.

The practice on this point seems unsettled, for in another case⁴ *Spragge*, V.C., granted an order to make a person interested in the equity of redemption of mortgaged property *ex parte*:—an affidavit of the plaintiff only being used on the application. Where, after a mortgage being given, the equity of redemption is severed so that different persons are entitled to redeem in respect of different parcels, those different persons must be made parties in a suit to foreclose the mortgage.⁵ This case was decided in 1861, and the Order of which Order 438 is a copy, was promulgated in the same year—probably after this decision.

SECTION III.—*Proceedings on a Decree for Foreclosure, Sale or Redemption.*

The decree having been obtained, the first step is to bring it into the Master's office. It is directed by Order 441, that "Decrees for foreclosure or sale, where a reference is required, are, after the proper recitals hitherto in use, to direct, in general terms, that all necessary enquiries be made, accounts taken, costs taxed, and pro-

¹ See *Jones v. Bank of Upper Canada*, ante, 12 Grant, 429, where the Court acted on the Order of June, 1861, of which this is a copy, although it was not a case where any difficulty arose from the number of parties.

² 1 Cham. Rep. 272.

³ *Penner v. Canniff*, 1 Cham. Rep. 351.

⁴ *Cummins v. Harrison*, 1 Cham. Rep. 369.

⁵ *Buckley v. Wilson*, 8 Grant, 566.

ceedings had for redemption or foreclosure (or for redemption or sale, *as the case may be*), and that for these purposes the cause is referred to (*naming the Master*): and a decree so expressed is to be read and construed as if the same set forth the particulars contained in next thirteen Orders."

One object of this Order is to simplify the decree since the full directions formerly given by the Court in each decree are now embodied in the Orders, and thus the expense of constant repetition is saved.

The first enquiry directed is as to encumbrancers. Order 442 requires that, "Upon such reference, the Master is to enquire and state whether any person or persons, and who, other than the plaintiff, has or have any lien, charge or encumbrance upon the land and premises embraced in the mortgage security of the plaintiff, in the bill mentioned, subsequent thereto."

The next Order, 443, directs that "The plaintiff is to bring into the Master's office certificates from the Registrar and Sheriff of the county wherein the lands lie, setting forth all the encumbrances which affect the property in the pleadings mentioned, and such other evidence as he may be advised."

It was a prevailing idea that under this Order the practitioner is to bring in these certificates dated at as late a day as possible; and having, before he filed his bill, obtained an abstract from the Registrar, and before he moved for his decree a certificate from the Sheriff, it has been usual to obtain a continuation of these before bringing the decree into the Master's office; but this is not necessary, and the costs will not be allowed: for, after the bill is filed, no subsequent encumbrancer is entitled to any notice of the proceedings to foreclose or sell under a registered mortgage.¹

The only encumbrances which the Master need now notice are those made subsequent to that of the plaintiff and before the filing of the bill,² by way of mortgage or other instrument creating a charge on the land; such registered decrees of the Court of

¹ Stat. of Ont. c. 20, s. 57.

² Stat. of Ont. c. 20, s. 57.

Chancery as are made a lien by statute, and judgments on which a writ of *fiery facias* or sequestration against lands has been placed in the hands of the Sheriff of the county where the lands lie; of these encumbrances the first two form a lien only from the date of registration in the Registrar's office of the county; the others from the date of delivery to the Sheriff. The Common Law Procedure Act, s. 249, provides that all writs of execution, excepting writs of *case*, shall remain in force for one year from their teste, (and the teste is the day of issue) unless renewed; and that if so renewed they shall have priority according to the time of their original delivery to the Sheriff.

Having obtained the abstract from the Registrar and the certificate from the Sheriff, the next step is to bring them into the Master's office.

Order 444 provides that "The Master is to direct all such persons as appear to him to have any lien, charge or encumbrance upon the estate in question, to be made parties to the cause, and to be served with a notice in the form set forth in schedule T, hereunder written."

The following cases will assist the Master in determining upon the description of creditors to be made parties.

G, a creditor of F, under a judgment recovered in 1856, filed his bill to redeem W, the alleged mortgagee, under a deed of conveyance to him from F, absolute in form. A creditor of W, under a judgment recovered in 1859, and kept alive by *fi. fa.* lands, was made a party in the Master's office as an encumbrancer subsequent to plaintiff. *Held*, that he could not properly be then made a party; but the plaintiff was allowed to amend his bill by making him a party, in order that an opportunity might be afforded him of contesting the plaintiff's right to treat the conveyance from F to W as a mortgage as against him. Where a conveyance absolute in form was executed as a security only upon a verbal undertaking of the grantee to re-convey upon payment of his demand—*Held*, that a judgment creditor of such grantee could not enforce his judgment beyond the amount of principal and interest due the grantee.¹ In

¹ *Glass v. Freckleton*, 10 Grant, 470

suits by judgment creditors for the sale of the debtor's property, the debtor is entitled, like a mortgagor, to six months to redeem before the sale takes place. The rule prescribed by the statute 43, Geo. 3, ch. 1, is not applicable to the practice of this Court.

To a bill by an encumbrancer for the sale of the property, all other encumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the Master's office, and the proceeds of the sale will be applied to pay off all the encumbrances according to their priorities.¹ The practice established by this decision (made in 1851) is now familiar, but the difficulty in its establishment will be seen by referring to the elaborate judgment of the Chancellor (Blake) in the case. On proceeding in the Master's office upon a reference as to encumbrancers in foreclosure cases, it is not necessary to make search in the office of any Deputy-Registrar of the Court to ascertain whether bills have been filed upon registered judgments, as such bills only preserve the rights of the judgment creditors in the particular suits in which they are filed.²

By the repeal of the Act referred to in this case the importance of the point decided was much lessened, but questions may still arise on it, where titles are being searched.

Where the Master is directed to enquire as to encumbrancers, and there is a dispute between two or more persons as to who are entitled to one of the encumbrances, it may, according to circumstances, be his duty to decide the question himself or to report the encumbrance, its priority as respects other encumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question.³

¹ *Whits v. Beasley*, 2 Grant, 660.

² *Grainger v. Grainger*, 1 Cham. Rep. 241.

³ *McDonald v. Wright*, 12 Grant, 552.

SECTION IV.—*Proceedings on adding parties in the Master's Office.*

The decree should be brought in at the same time as the abstract and certificate. This proceeding is ex parte. The Master makes the following entry in his book in pursuance of Order 238 :

1868. John Doe v. Richard Roe, 21st January, 1868.	}	<i>Mr. Jones, solicitor for the plaintiff, brings in the decree of foreclosure (or sale) in this cause ; as also the Registrar's abstract and Sheriff's certificate, shewing that the following are encumbrances, viz.:</i>
--	---	---

William Smith, and

James Robinson.

These are hereby made parties in the Master's office, and are directed to be served with notice T under Order 444.

If the defendant, by bill, has answered, or has filed a disputing note, this further direction should be made.

" And I direct that the defendant, Richard Roe, be served with the proper warrant."

If any defendant, by bill, is also a creditor claiming a lien on the estate as such, the following further direction should be made under Order 446 :

" And I direct that the defendant, A B, be served with notice T under Order 446."

This Order (446) provides that " The Master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in schedule T, to be served upon encumbrancers made parties before the hearing, whether the bill has been taken *pro confesso* against such persons or not." Under the Orders of February, 1858, (from which this Order is taken), it was held that where the bill

was taken *pro confesso* against the mortgagor, it was not necessary to serve him with the notice set forth in schedule B to those Orders.¹

There are, therefore, three different appointments to be served :

I. Where a defendant is an encumbrancer as well as a party to the suit before the hearing—he is not made a party, but is served only with the notice T under Order 446.

II. Where a defendant has answered or filed a disputing note—he is served with a warrant only. This warrant is underwritten thus :

“ To vouch and prove claims—

“ To settle report ;

“ To tax costs, and

“ To sign report on the day of next,
at o'clock ”

III. Where an encumbrancer has been made a party in the Master's office—he is served only with notice T under Order 444.

If infants are made parties, a guardian *ad litem* must be appointed in the usual way before the reference can be proceeded with, as this guardian will be the proper person to serve with the necessary appointment or warrant.

It will be observed that the warrant is so underwritten as to make all its different branches attendable at the same hour. This is done as a matter of convenience merely, for it rarely happens that these proceedings in a foreclosure suit may not be completed in even less than an hour ;—where, however, any difficulty arises as to the plaintiff's account, or the proof of it—or where any party interested desires a reasonable time to consider the claims made—it is the duty of the Master to adjourn all or such of the appointments

¹ *Baby v. Woodbridge*, 5 U. C. L. J. 67

as may be necessary to a future day, giving such reasonable time as may seem just to all the parties. Under the English practice, it was usual to issue separate warrants, attendable at different days. This was the practice at one time here; and it is even now the practice of some Masters to appoint different hours during the same day for these different proceedings; but this is not necessary, and in most cases it produces delay and inconvenience: for if all the parties are able and willing to conclude the whole reference at once, there is no reason why they should be obliged to wait for the arrival of a future hour; and if it becomes necessary to delay any of the proceedings, the Master has full power to adjourn any or all of them.

The Master, having made the proper entries in his book as described, signs the notice under Order 444, or the appointment under Order 446, or the warrant, and gives them out to the solicitor for service.

There is no time specified within which these must be made attendable. The Master has a right to make them so within two clear days after service; but it is usual to allow fourteen clear days to elapse between the service and return, in order to prevent the confusion which might otherwise arise under Order 445. This Order declares that "Any party served with a notice under Order 444 may apply to the Court at any time within fourteen days from the date of the service, to discharge the order making him a party or to add to, vary, or set aside the decree."

It may here be mentioned, that, where a person, made a party in the Master's office, appears and disclaims, he will not be allowed any costs, as he would effect the same object by staying away.¹

It sometimes occurs that the party to be served resides out of the jurisdiction. Section 6 of Order 7 of the Orders of 10th January, 1863, provided for such a case by declaring that "The time within which any party served with any petition, notice or other proceeding, other than a bill of complaint, was to answer or appear to the same, is to be the same as prescribed for answering or demurring to a bill of complaint according to the locality of service;" and the

¹ *Hatt v. Park*, 6 Grant, 553.

times for answering a bill according to the various localities without the jurisdiction were fixed by the five preceding sections of the Order; these five have been copied in Order 90 of the Consolidated General Orders; this one has been omitted, but it is presumed to be still in force under Order 2.

If, on the day appointed for the attendance upon the appointment, the solicitor may have not been able to effect all the services, he should, nevertheless, attend and get the Master to receive and mark in his book proof of such services as he may have completed, and he will adjourn the appointment until all have been served. The proper course in such a case is for the Master to mark on the notice, appointment or warrant the fact of the adjournment, thus: "*Adjourned to A. B., Master.*"

Order 448 directs that, "When all parties have been duly served, the Master is to take an account of what is due to the plaintiff, and to such other incumbrancers (if any), for principal money and interest, and to tax to them their costs, and settle their priorities; and also to appoint a time and place, or times and places, for payment, according to the practice of the Court."

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption.¹

When all the services have been completed, the plaintiff's solicitor attends, with any other solicitor who may be entitled, and the Master, after seeing that the services are properly proven, either by affidavit or admission, makes the following entry in his book:

1868. John Doe v. Richard Roe. 21st February.	}	Mr. Jones' appointment from 21st January, 1868, (page) attended by him for plaintiff. Mr. P. for defendant by bill. Mr. F., solicitor for William Smith, and Mr. C., solicitor for James Robinson.
---	---	---

¹ *Hill v. Forsyth*, 7 Grant, 461.

The services are proven as follows :

Richard Roe.....	Served	1st	February.
William Smith.....	"	"	"
James Robinson.....	"	2nd	"

I proceed on the claims now brought in.

Generally speaking, the affidavit of claim should be made by the person entitled to receive the money ; but this is sometimes very difficult to obtain, for it not unfrequently happens that money belonging to persons in a foreign country is lent here by their agents—or it may be that the person who lent the money has removed to a distance, and has, since his removal, transacted the business of the mortgage, or other security, through an agent. In such cases, it is usual to allow the claim on the affidavit of the agent, but he must be able to state such facts as lead to the fair conclusion that his acts have not only been authorized by his principal, but that he has not been interfered with by him, either in the arrangements made or in the receipts of payments on account. If the Master should find reason to suspect that dealings have been had between the debtor and his creditor beyond the knowledge of the agent, he should require further evidence.¹

I.

Plaintiff's Claim.

Principal due on the mortgage in the bill mentioned, dated 1st January, 1864, registered 10th January, 1864, given by the defendant, Richard Roe, to the plaintiff (or to *one William Brown, as the case may be*), securing \$1000 and interest at 8 per cent., and assigned by the said Brown to one James Esk by deed dated 1st January, 1865, registered the same day, and by him to the plaintiff by deed dated 1st January, 1866, registered 10th January, 1866..... \$500 00
Interest thereon from 1st January, 1866, to 1st July, 1867.....

(*And so on, shewing the precise state of the account as set forth in the account filed, or as it should be if the calculations of interest are correct.*)

[*If the account, however, be very lengthy, it will be proper to refer to it generally, both in the Master's book and in the report, giving only the results ;*

¹ *Rea v. Shaw*, 1 Cham. Rep.; 209, and cases collected post.

but it will be found the more satisfactory practice to give very clear statements; for it may be extremely difficult at a future day to explain to the Court, or to any one interested, how the results are obtained, unless the Master be careful to make the necessary entries in his book.]

Balance of principal now due	\$.....
" " interest "
Six months subsequent interest on \$..... (balance of principal) from	\$.....
(date of report) to	\$.....
Costs taxed and revised at	\$.....
Total due plaintiff (six months after date of report)	\$.....

If the mortgage contains a covenant on the part of the mortgagor to ensure (but not otherwise),¹ and in default that the mortgagee may do so, and charge the amount paid to the mortgagor, and that it may form a further lien on the land, this amount shall form part of the claim, and should be set out in the affidavit of claim. If allowed, interest should also be allowed,—if any rate be specified, at that rate—if not, at 6 per cent.

*If taxes have been necessarily paid by the mortgagee, they form a proper charge on the land, and should appear in the account, whether there be any agreement respecting them or not. Where the plaintiff is assignee of the mortgagee it will be remembered that the effect of the affidavit required is pointed out by statute, Consolidated Statute of Upper Canada, ch. 87, s. 4, which enacts that "On any proceeding for foreclosure by, or redemption against an assignee of a mortgagee, the statement of the mortgage account under the oath of such assignee, shall be sufficient *prima facie* evidence of the state of such account, and no affidavit or oath shall be required from the mortgagee, or any intermediate assignee denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies the correctness of such statement of account by oath or affidavit."*

¹ *Kerby v. Kerby*, 5 Grant, 587.

II.

Claim of the said William Smith.

Principal due on a mortgage given by the said Richard Roe to the claimant, dated 1st May, 1865, registered 5th May, 1865, securing \$400 and interest.	\$500 00
Interest thereon from 1st May, 1865, to 1st January, 1866.	\$20 00
Deduct rents and profits from 1st January, 1866, to 1st January, 1867, at \$100 per year.	100 00 80 00
	<hr/>
	\$420 00
Interest on \$120 from 1st January, 1867, to..... (date of Report)	\$.....
Deduct rents and profits from 1st January, 1867, to same date.	\$.....
Six months subsequent interest on \$....., (balance of principal after adding interest and deducting rents, the rents however being applied first in payment of interest) from.....to.....	<hr/> \$.....
Costs allowed at 1	\$ 9 00
Total due on this claim	1868. \$.....

[It may here be remarked that if the decree be for SALE it is proper to compute six months subsequent interest on all the claims, because the defendant is directed by the decree to pay all the claims at one time on the expiration of the six months; but where the decree is for FORECLOSURE, it is proper to compute the six months subsequent interest on the plaintiff's claim only, because the decree gives to the encumbrancer the right to redeem the plaintiff by paying him the amount found by the report to be due to him at the expiration of the six months; and in the event of such redemption the defendant, by bill, is required to pay him the amount so paid to the plaintiff, together with the amount of his own claim, with all subsequent costs and interest. Where there are several encumbrancers, the proper course is to compute interest only on the claim of the last encumbrancer, but one. The further consideration of their claims will be delayed until the report is arrived at.]

1 By analogy to the power conferred by Order 225, it is customary to save the expense of revision where nothing more than the ordinary proof by affidavit is required by fixing these costs at \$9, including the Master's fees, this being the usual amount allowed where a revision takes place.

III.

Claim of the said James Robinson.

Amount of a judgment received by this claimant against the said Richard Roe, 10th June, 1865, (on which a <i>fi. fa.</i> against lands was placed in the hands of the Sheriff of the County of..... on the 1st August, 1866, and duly renewed on the.....) for true debt.....	\$200 00
Costs taxed at law.....	40 00
	<hr/> \$240 00
Interest on \$240 from 10th, June, 1865, to.....(<i>date of report</i>).....	\$.....
<i>Fi. fa.</i> goods and Sheriff's fees ¹	\$.....
" lands and Sheriff's fees ¹	\$.....
" renewals and Sheriff's fees ¹	\$.....
	<hr/> \$.....
Costs allowed at.....	\$..... 9 00
	<hr/>
Total due on this claim on....., 1868.....	\$.....

The accounts having been taken the Master taxes the costs of all parties (omitting those of the simple claims just referred to), and sends them for revision under Order 311. He then enters in his book the particular bank at which the mortgage money will, by his report, be made payable. It is usual to consult the plaintiff's solicitor as to this, and to name such town and bank as he may suggest, but this is optional with the Master.

It frequently happens that some of the parties served do not attend. The duties of the Master in such a case are pointed out by Order 447, which directs that "Where any person who has been duly served with a notice under Order 444, or with an appointment under Order 446, neglects to attend at the time appointed, the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the Court order otherwise, upon application duly made for that purpose."

Where an encumbrancer has neglected to appear in the Master's office to prove his claim, within the proper time therefor, and applies to the Court for leave to come in, the application is more properly

¹ The amount "recovered" by a judgment includes the verdict, interest and taxed costs; in short, it is the amount for which the judgment is entered. The amounts to be allowed for *fi. fas.* are those properly taxable at law.

made on notice of motion than by petition.¹ In this case the Report must have been signed and given out; for until then the Master would have been the proper person to grant the leave.

In a foreclosure suit the Master at Whitby made the usual order making certain judgment creditors parties on 26th April, 1861; but they were not served till 3rd June following. They did not appear before the Master, and after he had made his report, they applied by motion to be allowed to come in and prove their claims. *Held*, that they were parties to the suit from the day that the Master made his order; that the application by motion was regular, and need not be by petition, and that they might come in and prove their claims on terms.² An encumbrancer has no right in the Master's office to impugn a prior judgment on the ground that it was irregularly obtained at law.³

Having in a former part of this work collected a number of the rules which govern the taking of mortgage cases, and having now, shown more minutely how the account is actually taken, it will be convenient here, before proceeding to a consideration of the Report, to introduce some decisions in our own Court on mortgage dealings

Where the amount of money advanced on mortgage was less than the sum mentioned as the consideration money, the mortgagor is at liberty, in taking the account in the Master's office, to show the true sum advanced, with a view of reducing the amount of his liability, although he has not appeared to or answered the bill; he cannot, however, be permitted to show that the contract was usurious. A tender by the mortgagor stops interest.⁴

And were a mortgagee takes possession of the mortgaged premises, and evicts a tenant of the mortgagor who is willing to continue in possession and pay rent, the mortgagee will be held accountable for the rents from that time.⁵ If a mortgagee retains possession of the property after being paid in full, the general rule is to charge him with interest and rests in respect of his subsequent receipts. A

¹ *Anonymous* 1 Cham. R. 292.

² *Sterling v. Campbell*, 1 Cham. R. 147.

³ *Hamilton v. Thornhill*, 8 U. C. L. J. 73.

⁴ *Knapp v. Bower*, 17 Grant, 695.

⁵ *Penn v. Lockwood*, 1 Grant, 547.

fortiori is such a charge proper where a mortgagee resists the mortgagor's right to redeem.¹

The debtor of a mercantile firm being desirous of extending his transactions with his creditors, executed to them a mortgage to secure the sum of £2,000; subsequent transactions between the parties to a large amount took place, and during one year alone, the sums charged to the debtor, including the sum due on the mortgage amounted to £30,000, and after four year's dealing between the parties from the time of executing the mortgage, an account was delivered to the debtor, showing a balance of £1,641 against him. Upon a bill filed to foreclose the mortgage for the amount, the Court held that the transactions which had taken place, discharged the mortgage debt.²

The case of *Re Browne*³ is referred to in this case and commented on as to some extent governing the point in question here. Both cases came before the Court, the first on appeal from the Commissioner in Bankruptcy in 1851, the other upon the pleadings without having been before the Master; but the same questions might easily arise before him in taking the account on a mortgage.

In *Re Brown* the case was, that a creditor who takes a mortgage from his debtor for £2,000 (part of a debt of £2,414 18 11) and afterwards renders accounts, commencing with the balance of £2,414 18s. 11d., and taking no notice of the mortgage for the £2,000; and in such accounts credits (without any opposition from the debtor) sums received after the mortgage given, but before it fell due: *Held*, that this proved an appropriation of such sums towards payment of the original debt, including that part of it which was secured by mortgage.

Held also, that in those cases in which parol evidence is admissible to control the legal operation of a deed, no effect can be given to such parol evidence if it is contradictory, or its accuracy is involved in doubt.

¹ *Crippen v. Ogilvie*, 15 Grant, 568.

² *Buchanan v. Kerby*, 5 Grant, 332.

³ 2 Grant, 111, and 590.

Where a mortgage was to secure advances to be thereafter made from time to time, and interest thereon, and there were mutual accounts between the parties, the items of which were entered in the mortgagee's books, with the concurrence of the mortgagor who was his clerk; *Held*, that the credits given therein to the mortgagor were first applicable to the interest on all these advances, and then to the eldest of the principal sums charged.¹ Where partnership business was carried on in buildings erected by the funds of the firm, upon lands for part of which the patent from the Crown had issued in the name of one of the partners, parol evidence was received to show whether the land was separate or joint property.²

A mortgagee in possession of a grist mill and other property erected a carding and fulling mill upon the premises; the expense of this was disallowed to him as being an improvement that a mortgagee could not make without consent.³ It being doubtful at what time the mortgagor died, his widow and all his children joined in a suit to redeem in order that all questions under the act abolishing the law of primogeniture might be avoided; at the hearing the Court gave leave to furnish proof of intestacy by affidavit, with a view to making the decree as asked. *Semble*, that when a mortgagee is charged with rents and profits received from improvements made by himself, it would be unreasonable to refuse to allow him the expense of such improvements to a corresponding amount.⁴

A trader being indebted to a wholesale merchant for goods supplied, executed a mortgage in favour of the creditor securing £3000, and the creditor having entered into a new partnership, the firm continued to make further advances for several years, during which time the debtor made several payments, much more than would have been sufficient to pay off his original indebtedness, and the firm in rendering their accounts to the mortgagor did not bring in the old debt;—upon appeal from the Master's report, it was held that these circumstances were sufficient to show that the security was intended to cover a floating balance.⁵

¹ *Ross v. Perrault*, 13 Grant, 206.

² *Newton v. Doran*, 3 Grant, 353.

³ *Kerby v. Kerby*, 5 Grant, 587.

⁴ *Constable v. Guest*, 6 Grant, 510.

⁵ *Russell v. Davey*, 7 Grant, 18.

A mortgagor paid the mortgagee from time to time money in pursuance of an agreement, contemporaneous with the mortgage, that five per cent. per annum, in addition to the legal rate of interest, should be paid on the amount loaned. In taking the account in a suit brought by the mortgagee to foreclose, the Master gave credit for the money thus paid, as so much money paid on account of principal and legal interest. *Held*, on appeal from the Master, that he was right in his mode of taking the account;— and *held also*, that Sec. 2 of 16 Vic., c. 80, did not bar the right to recover in an action of assumpsit, for money paid in excess of legal interest.¹

Another case of *Quinlan v. Gordon*, reported in 7 U. C. L. J., 232, came before the same Master in which the same point was raised. He felt bound to follow the decision in *Stinson v. Kerby*, though a case of *Kaines v. Stacey*,² and another of *Jarvis v. Clark*³ had in the meantime been decided in the Common Pleas holding the reverse. *Quinlan v. Gordon* was taken to the Court of Appeal and reversed, so that the law as laid down by the Common Pleas may now be considered the proper rule.

It was held in *Kaines v. Stacey* that money voluntarily paid in excess of interest cannot be recovered back, nor upon an action brought to recover the principal, can it be set up as a discharge of such principal. In *Quinlan v. Gordon*, in Error and Appeal, the head note is as follows: “The defendant gave plaintiff a mortgage on certain freehold property conditioned to pay £375 with interest, meaning according to the Statute then in force, (16 Vic. ch. 80), at six per cent. Afterwards the defendant agreed to pay further interest for forbearance each year, and gave notes for such extra interest, which were paid. In taking the account of moneys due to the plaintiff, the Court of Chancery credited the defendant with such payments as on the mortgage, and six per cent.—therefore the mortgagee appealed; and it was *held* that the mortgagor not being entitled to recover money voluntarily paid on an illegal contract should not have been so credited; that the account should have been taken without reference to the moneys so paid. *Stimson v. Kerby* and *Brown v. Oakley*, were referred to, and the former overruled.

¹ *Stimson v. Kerby*, 7 Grant, 510.

² 9 U. C. C. P. 355.

³ 10 U. C. C. P. 480.

A parol agreement to add two per cent. to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment was held insufficient to charge the extra interest upon the land.¹ It will be observed that this is not a case between mortgagor and mortgagee, but one between mortgagee and purchaser. During the lifetime of a mortgagor, the mortgagee has no lien on the mortgaged property for more than six years' arrears of interest, though he may have a personal action on the covenant for more; but, in this country as well as in England, after the mortgagor's death, the mortgagee, to avoid circuitry, may, as against the heirs, tack to his debt all the interest recoverable on the covenant.² A bargain for extra interest made between a derivative mortgagee and a mortgagor inures to the benefit of the original mortgagee.³ The decree directed a reference to the Master to take an account of the amount due upon the mortgage in question. The only evidence before the Master, besides what was used at the hearing of the cause, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the Master's report finding the whole amount due was allowed. *Seem*, that the *onus* of proof under such a reference rests upon the holder of the mortgage.⁴

In taking the account in the Master's office it is improper to charge a mortgagee in possession with annual rests on rents received by him until he is paid off in full.⁵ The rule in equity is that the assignee of mortgage takes it subject not only to the state of the account between the mortgagor and mortgagee, but also to the same equities as affect it in the hands of the mortgagee.⁶

Two years after a mortgage had been in part paid off, the mortgagor applied to the mortgagee, to re-borrow the money, agreeing verbally to return the receipts for the money paid, so that there should not remain any evidence of payment, and that the amount so re-borrowed should be considered of the original charge created by the mortgage; some, but not all of the receipts were returned to

1 *Totten v. Watson*, 17 Grant, 233.

2 *Carroll v. Robertson*, 15 Grant, 173.

3 *Grahame v. Anderson*, 15 Grant, 189.

4 *Elliott v. Hunter*, 15 Grant, 640.

5 *Coldwell v. Hall*, 9 Grant, 110.

6 *McPheeson v. Dougan*, 9 Grant, 258.

the mortgagee, and the money re-advanced by him upon the terms proposed by the mortgagor ;—under this state of facts, the Master in taking the accounts directed by the decree, allowed the mortgagee the full amount of the mortgage. On an appeal from the Master's report, *held*, that the principle upon which he had taken the account was correct, and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced. (Vankoughnet, C., dissenting)¹ This case is valuable as showing to what length the Court will go in giving effect to an equitable estoppel.

Where a mortgage deed contains no provision as to the application or appropriation of insurance money coming to the hands of the mortgagee before the time appointed for payment of the money secured by the mortgage, he is not bound to apply it in reduction of the sum secured, or the interest accruing thereon, until the expiration of the time allowed for payment of the mortgage money ; in such a case the mortgagor would be entitled to have the money expended in re-building the premises, and replacing all parties as near as may be in the situation in which they stood before the fire occurred.²

A mortgagee insuring the mortgaged premises against accident or damage, by fire, out of his own funds, is entitled to receive the amount of the policy, in the event of loss, for his own benefit, without giving credit therefor upon the mortgage.³

To show the balance due on a mortgage, the party proving the claim, in addition to swearing to the balance, produced certain books in the Master's office, and made affidavit that by these books the balance claimed on the mortgage could be discovered. Neither party asked him any questions in reference to them, nor was he asked to explain them, and the Master stated that, on looking at the books, he could not from them understand the account. *Held*, on appeal from the ruling of the Master, that the oath of the claimant standing unimpeached, though not supported by the partial statement furnished by him, but which he offered to make complete if re-

¹ *Inglis v. Gilchrist*, 10 Grant, 301.

² *Austin v. Story*, 10 Grant, 306.

³ *Russell v. Robertson*, 1 Chain. Rep. 72.

quired, from the books, the Master should have acted on it, and allowed the claim.¹

One partner of a firm gave, as security for half of the partnership indebtedness, a mortgage on his separate real estate; the other partner gave an endorsed note for the remaining portion of the debt. Subsequently payments were made to the creditor on account of the joint debt, which he credited on the note, claiming to hold the mortgage for the entire balance. *Held*, that an assignee of the mortgagor was entitled to have one half of all sums which had been paid out of the partnership assets on account of the debt credited on the mortgage security.²

In a redemption suit by the second mortgagee against the first, it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession of the premises, and had cut and removed timber therefrom, to a greater value than the amount due on his mortgage. *Held*, that the first mortgagee was only bound to account for the value of such timber and occupation rent as was taken or received by him as mortgagee, and not for that taken or received in his other capacity, as owner of the equity of redemption, but that the second mortgagee might ask for a receiver.³ A mortgagee of land, part of which was taken by a Railway Company, was offered £100 as compensation for the land so taken, which he had refused, and the matter having been referred to arbitration, £30 only was awarded. On a bill filed to redeem, *held*, that under the circumstances, he was chargeable with the sum awarded, and no more.⁴

A mortgagee of unpatented land, after certain judgments were registered against him, assigned all his estate for the benefit of his creditors. The trustee paid to the Government, out of the trust estate, the balance of the purchase money. *Held*, that in respect of the sum so paid, he was entitled to priority over the judgment creditors.⁵

1 *Hancock v. Moulson*, 10 Grant, 433.

2 *Moore v. Riddell*, 11 Grant 60.

3 *Steinhoff v. Brown*, 11 Grant, 114.

4 *Gunn v. McDonald*, 11 Grant, 140.

5 *McIntyre v. Shaw*, 12 Grant, 295.

Where a reference is directed to take an account of what is due on a mortgage, it is competent to the parties to show the real object for which it is made, if that is not apparent on the face of the instrument; and when the bill has been taken *pro confesso* it is incumbent on the Master to require the mortgagee to show how the money secured by the mortgage was advanced, and, *semble*, that such a course would be desirable in all cases.¹ The remarks by Esten, V. C., in this case have probably induced more strictness in framing the usual affidavit of claim on a mortgage than was before usual.

In a suit for foreclosure upon a mortgage given by the purchaser for part of the purchase money, damage, or loss sustained by failure of title, or of incumbrances, or charges on the property sold, cannot, under the covenants for title, form the subject of a set-off to the amount secured by the mortgage before the amount is ascertained by action or otherwise.²

A decree was made for the foreclosure of a mortgage given for £100, with interest; it appeared by the defendant's evidence in the Master's office, that no money was advanced by the mortgagees; and the Court held, chiefly on the conduct of the parties, and the circumstances of the case, that the mortgage was intended as a security for a note of the mortgagor's, endorsed by the mortgagees contemporaneously with the execution of the mortgage, and for any subsequent transactions with the mortgagor growing out of it.³ In this case the defendants gave parol evidence to shew the real nature of the transaction, which, Mowat, V.C., said they, no doubt, were at liberty to do, citing *Penn v. Lockwood*.⁴

Where two persons were mortgagees, and one of them assigned his interest to the other, the mortgagor was allowed credit as against the assignee for goods delivered to the assignor until notice of the assignment.⁵

It frequently happens that the Master is called on, in taking accounts on mortgages, to allow a higher rate of interest than is

¹ *Sterling v. Riley*, 9 Grant, 343.

² *Hamilton v. Banting*, 13 Grant, 434.

³ *Brownlee v. Cunningham*, 13 Grant, 586.

⁴ 1 Grant, 547.

⁵ *Galbraith v. Morrison*, 8 Grant, 239.

fixed by the mortgage, upon some agreement subsequent to its execution, but not under seal, and expressing no consideration. The case of *Brown v. Deacon*¹ states the rule on this point:—an instrument under seal may be varied in equity by an agreement for valuable consideration, not under seal. A written promise by a mortgagor, after default to allow more than the six per cent. interest reserved by the mortgage was held to be binding on the authority of the *Alliance Bank v. Brown*, 10 Jar. N. S. 1121; though there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise. And in a subsequent case where it was stipulated in a mortgage that up to a certain day the interest to be charged should be eight per cent. and if the principal were not then paid, twelve per cent. should be thereafter charged, it was held that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named.² The court is disinclined to countenance agreements for high rates of interest, and in one case³ it was doubted whether the amount of interest (24 per cent. in the particular instance) reserved by a mortgage, may not be so great as to evidence such a case of oppression as would induce the court to refuse to interfere in behalf of the mortgagee, leaving him to his remedies at law, notwithstanding the repeal of the usury laws. In one case a decree was pronounced in favour of the mortgagee where the rate of interest was 30 per cent. per annum, and Spragge, V. C., allowed the decree to go in *Goodhue v. Widdifield*, observing that it may be urged that the legislature intended when they abolished the usury laws, that all the remedies both at law and in equity should be open to the lender.

Where the plaintiff is in possession as mortgagee of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment; so, where it appeared that a mortgagee under such circumstances had been charged with occupation rent only to the date of the Master's report, and had since continued in possession, the final order was refused.⁴

¹ 12 Grant, 198.

² *Waddell v. McCall*, 14 Grant, 211.

³ *Goodhue v. Widdifield*, 8 Grant, 531; and see *Totten v. Watson*, 17 Grant, 233.

⁴ *Pipe v. Shafer*, 1 Cham. R. 251.

The Master should be careful that the time appointed for payment of mortgage money by his report do not fall upon a Sunday, as in such a case the parties will be put to the expense of having a new account taken, and a new day appointed, and the court will direct that a copy of the order be served on the defendant or his solicitor.¹

Where the Master's report directing the payment of mortgage money on a day being six months from the date thereof is not dated, and the decree gives six calendar months, a new day must be appointed for payment.²

A decree for the sale of property was directed at the suit of a surety of the mortgagor. In proceeding to take the accounts it appeared that the mortgagee had paid off such prior encumbrances, and the Master in taking the account allowed him credit for the sums so paid, although no direction to that effect was given by the decree, the surety insisting that, as between him and the mortgagee, he was entitled to receive credit for the gross amounts produced at the sale without any reference to the sums so paid to the prior encumbrancers, appealed from the Master's finding in this respect, but the Court dismissed the appeal with costs.³

A debtor having executed a mortgage in favor of his creditors, reciting that he was indebted in a sum named, and a suit to foreclose this mortgage having been subsequently instituted, a reference to the Master was directed to take an account of what was due; in taking which the Master required the production of the accounts on the fact of which the mortgage debt was created, and the usual four day order had been issued for non-production. *Held*, on a motion to set aside this order that the parties were *prima facie* bound by the account stated in the mortgage as being the true debt, and that the Master, in the absence of evidence to impeach the statement in the mortgage, could not go behind it.⁴

The Master in settling the report will take care to observe Order 465, which provides that "Where a mortgagee has proceeded at law

1 *Holcomb v. Leach*, 3 Grant, 449.

2 *Scott v. McKeown*, 1 Cham. R. 186.

3 *Teeter v. St. John*, 10 Grant, 85.

4 *Pollock v. Perry*, 5 Grant, 591.

upon his security, he shall not be entitled to his costs both at Law and in Equity, unless the Court sees fit to order otherwise." The following cases have been decided on this point. Where it is shown that a mortgagor has for the *bona fide* purpose of preserving the mortgage premises from destruction or delapidation instituted proceedings at law to obtain possession of the property, he will not be deprived of his costs in equity.¹ In a subsequent case² it was held that where a mortgagee proceeds both at law and in equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the chancery costs instead of those at common law, if the defendant objects thereto.

The result of these cases is that as the Court does not interfere with the costs at law, it will not permit the plaintiff to recover his costs in equity, unless special circumstances are shown, and the Master will in such a case, refuse to tax equity costs, unless an order of Court for that purpose be first obtained.³

The Master having taken the accounts, settled the priorities, and taxed the costs, sends the bills for revision, and on their return inserts the amount as revised in the report, and having signed it, gives it out as already mentioned. It is provided by Order 449, that "The Master's report must state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided, the names of such as have made default, and must settle the priorities, &c., of such as have attended, and these latter are to be certified as the only encumbrancers upon the estate."

The report having been filed and no appeal being made from it, the plaintiff waits until the time appointed for the payment of the money in foreclosure and sale cases has elapsed. It was formerly necessary for the party entitled to receive the money, or some one holding a power of attorney for the purpose, to attend at the place indicated by the report (usually the office of the plaintiff's solicitor) during the time specified or a portion of it; but that practice is altered by Orders 255, 256, and 257 already referred to.

¹ *Dallas v. Goss*, 1 Cham. Rep. 65.

² *Weir v. Taylor*, 1 Cham. Rep. 371.

³ See *Ontario v. Winnaker*, 13 Grant, 443.

Although the practice of making mortgage money payable at a private office is discontinued, yet there are cases where other money may be made payable at a place other than a bank, between certain specified hours, and as to these the principle of the following cases may apply. It is not necessary for the mortgagee to remain at the place appointed by the Master's report during all the time limited for the payment of the mortgage money; his attendance so early as to allow a reasonable time for payment of the mortgage money before the expiration of the hour named will be sufficient.¹

In a subsequent case an application was made for the final decree of foreclosure, default having been made in payment of the amount found due. The affidavits showed that the agent of the plaintiff had attended for fifteen minutes of the two hours appointed for payment. *Esten, V. C.*, doubted when the motion was made if the attendance had been sufficient to entitle the plaintiff to the final order; but after taking time to look into the authorities, he ordered the decree as asked to go.² It may here be noticed that a mortgagee cannot be compelled to receive payment before the day fixed, though the full amount of principal and interest up to that day be tendered.³ The Court will, where it is necessary, change the place appointed for paying mortgage money; but only on personal service of the order on the defendant where he has not appeared by solicitor.⁴ Where a mortgage was made to secure a partnership debt, a final order of foreclosure was granted, although one of the co-partners had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment, it appearing that such partner was, and had been for some time, resident out of the country, and had never interfered in the mortgage transaction in any way.⁵

But in a later case, a suit for foreclosure or sale was brought by the mortgagees residing in Scotland, the defendants then being resident in this country. Since proceedings had been instituted the defendants had removed from the Province, two being

¹ *Saunderson v. Caston*, 2 Grant, 436; decided in 1851.

² *Mitchell v. Hayes*, 1 Cham. Rep. 56.

³ *Brown v. Cole*, 14 Sim. 427.

⁴ *Jones v. Bailey*, 1 Grant, 353.

⁵ *Counter v. Wylde*, 1 Grant, 538.

resident in England and another in California. Default had been made and the plaintiff moved for an order absolute for sale. There was no affidavit of non-payment by the plaintiffs, but the agent in this Province negatived the payment.¹

In a suit of foreclosure by the executor and devisees of a deceased mortgagee, where the executor alone had attended at the time and place appointed, and it did not appear that the debts of the estate had been paid, the attendance was held sufficient and the final order was granted.² And where the mortgagee had become bankrupt and he and his assignees filed a bill to foreclose, the final order was granted, though one of the assignees, on account of his absence from the country, had not executed the power of attorney or made an affidavit of non-payment.³

Where the day appointed fell upon a Sunday, the final order was refused, though attendance had been made on the Saturday and Monday preceding and following.⁴ Where a mortgagor sought to set aside a final order of foreclosure on the ground that mesne incumbrancers had not been made parties, an application made by him for that purpose seven months after the date of the final order, was refused, as the objection could and ought to have been made at the hearing, or in the Master's office.⁵ Where the decree of foreclosure is erroneous, the Court will refuse to pronounce the final order of foreclosure on default of payment.⁶ Where mortgage money was ordered to be paid into an agency of the Bank of Upper Canada, and afterwards and before the day appointed for payment, the agency was closed; on a motion to substitute another bank at the same place, *Held*, that a new day for payment must be fixed, and the order served.⁷

It is only necessary now to obtain from the cashier, manager or agent of the bank where the money has been made payable by the report, as soon as convenient after the day appointed, his certificate

¹ *McKechnie v. McKechnie*, 1 Cham. Rep. 42.

² *Evans v. Parker*, 2 Grant, 555.

³ *Lyman v. Kirkpatrick*, 2 Grant, 625.

⁴ *Holcomb v. Leach*, 3 Grant, 449.

⁵ *Cameron v. Lynes*, 1 Cham. Rep. 42.

⁶ *Commercial Bank v. Graham*, 4 Grant, 419.

⁷ *King v. Connor*, 1 Cham. Rep. 274.

of the non-payment,¹ but before moving for an order of foreclosure or sale an affidavit of the non-payment must also be made by the party entitled to receive the money, or his agent. If the affidavit be made by an agent, the remarks made *ante* respecting an affidavit of claim by an agent will apply to that now required to be used before the Court on moving for the final order of foreclosure or sale. The affidavit of non-payment should not be made on the day the money is due, but subsequently.²

It will be convenient now to consider the subsequent practice in the following different cases, and their subdivisions :

- I. Where the case is foreclosure between mortgagee and mortgagor or their assigns simply, and the mortgagor or his assignee pays.¹
- II. Where in such a case the mortgagor makes default.
- III. Where there is a subsequent encumbrancer in a case of foreclosure, and he makes default.
- IV. Where in a similar case there are several subsequent encumbrancers, and they all make default.
- V. Where in case of a decree for sale, there are no encumbrancers.
- VI. In a similar case where there are encumbrancers and they all make default, or where one redeems.

I. *And first, where the decree is for foreclosure between mortgagee and mortgagor or their assigns simply, and the mortgagor or his assignee pays.* In this case it is directed by Order 450, "That in case of payment by any party according to the report, the party to whom payment is made, is to convey the premises free and clear of all encumbrances done by him, and deliver up all deeds and writings in his custody or power, relating thereto, upon oath to the party making the payment, or to whom he may appoint." In a

¹ Order 38, under which Deputy Registrars issue the decree where the case is between mortgagee and mortgagor simply, is noticed in another place.

² *Blong v. Kennedy*, 2 Cham. Rep. 453.

case of this description the time appointed for payment by the report shall be six months.¹

It not unfrequently happens that the mortgagor hoping eventually to redeem his property, but being unable to make the payment at the time appointed by the report, applies to the Court for further time. The following cases and orders will explain the practice on this point: In offering a motion to enlarge the time for payment of mortgage money found due by the Master's report, the mortgagee swore that in consequence of non-payment by the mortgagor, he had been obliged to raise money to meet liabilities of his own at a rate much beyond the rate payable under the mortgage; on granting the extension, the mortgagor was required to pay such a sum, in addition to the rate reserved by the mortgage, as would cover the interest payable by the mortgagee.² Six months further time was given for payment of the mortgage money, on an application made the day before the money was due, when it was shown that the property would be greatly enhanced in value in the meantime by the construction of a contemplated railway, on payment of interest on principal and interest due and the costs of the application.³ Suing at law for part of the mortgage money, for which the note of a third party had been given as collateral security, will not open the foreclosure if such suit is brought before foreclosure completed.⁴

A Judge in Chambers, though not as a matter of right, extended the time for the payment of mortgage money where the money was for purchase money, and the vendor had made a prior mortgage on the property which he had not paid off according to his covenant for title, and it appeared that the existence of the first mortgage prevented the plaintiff from raising money to pay off the second.⁵ The Court refused to hear otherwise than in Chambers a motion to enlarge the time appointed for the payment of mortgage money; and on the motion being renewed in Chambers, on an affidavit of the defendant's Solicitor, stating his belief that the

1 *Rigney v. Fuller*, 4 Grant, 198.

2 *Howard v. Macara*, 1 Cham. Rep. 27.

3 *Cameron v. Cameron*, 2 Cham. Rep. 376; and see *Street v. Dolan*, 4 Cham. Rep. 227.

4 *Mills v. Choate*, 2 Cham. Rep. 374.

5 *G. Mortgagee v. V. Mortgagor*, 2 Cham. Rep. 33.

defendants had exerted themselves, and were still endeavoring to raise the money, and that the property was worth much more than the debt, the motion was refused with costs.¹ Where, through the default of the defendant in payment of mortgage, the plaintiff has had to raise money on security of the land, and very considerable delay has taken place before the application was made, and a final order had issued, the Secretary refused to set aside such order, and extend the time for payment.² In this case, on appeal from this decision to the Chancellor he held that where the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damage he may have suffered, and where there appears a prospect of the amount of the mortgage money being paid within the period asked for, the Court will not refuse to open the foreclosure. The time for payment of the mortgage money will be enlarged on the application of the mortgagor if the property be an ample security, and there is a probability of his being able to pay at the end of such enlarged time. The usual terms on which the order is granted are the payment of all arrears of interest and of costs, and the order contains a reference to a Master to compute subsequent interest, and tax subsequent costs in case the parties differ.³ In this case the ground upon which the order was granted was that the mortgagor had effected a sale of the property for £50 more than the plaintiff's claim, and that he expected to receive the purchase money in full in two or three months and the Court enlarged the time for six months on the usual terms. A proper case must be shown and the security should be ample.⁴ Strong grounds need not be shown, as the Court is indulgent to mortgagor's, but some reason should be assigned, otherwise the application will be refused.⁵ The security should be ample.⁶ The interests and costs will be required to be paid forthwith, even in the case of infants.⁷ An extension was granted, pending an appeal to the House of Lords, the mortgagor being required, however, to pay the full amount due for principal, interest and costs, and the cost of the application into Court; the mortgagee to receive the dividends of

¹ *Anonymous*, 4 Grant, 61.

² *Waddell v. McCall*, 2 Cham. Rep. 58.

³ *Ford v. Steeples*, 1 U. C. Jurist, page 282.

⁴ *Edwards v. Cunliffe*, 1 Madd. 287; *Ismoord v. Claypool*, 1 Ch. Rep. 262; *Holford v. Faye*, 1 K. & J. 677; *Anon.* Barn. 221; *Cocher v. Biers*, 1 Ch. C. 61; *Ford v. Wastell*, 6 Hare, 229.

⁵ *Nanny v. Edwards*, 4 Russ. 125.

⁶ *Ayre v. Hanson*, 2 Beav. 479.

⁷ *Coombe v. Stewart*, 13 Beav. 111.

the money when invested on his undertaking to repay them should the decree be reversed.¹ The order will in all cases proceed to foreclose the mortgagor upon non-payment at the appointed time of the sum, upon the conditional payment of which the order is made²; and if the condition be not complied with, the order of foreclosure absolute may be made as of course, and its discharge has been refused with costs.³; though it was sworn to have been obtained by surprise and pending a treaty between the parties. But the order has been discharged if the mortgagee, by his own act (as by receiving rent) vary the amount due between the date of the order, enlarging the time, or the Master's report made thereon, and of the order absolute.⁴

The time for payment of mortgage money was extended where it was shewn that the defendant was hampered and hindered in selling or raising money on the lands in consequence of an advertisement signed and circulated by the plaintiff's solicitors. Under the above circumstances the motion was granted without costs to the plaintiff.⁵ A defendant seeking to open foreclosure should shew some reasonable excuse for not redeeming at the proper time, also that he has a prospect of paying the mortgage debt if time be given him, and that the property is of much greater value than the amount due.⁶

II. *Secondly, where in a foreclosure suit between mortgagee and mortgagor, or their assignees simply, default is made in payment at the time and place appointed by the report.* In such a case it is directed by Order 451 that "In default of payment being made according to the report, the plaintiff is to be entitled, on an *ex parte* application, to a final order of foreclosure against the party making default."

This order is obtained on production before the court of the certificate of the Bank manager verified by affidavit,⁷ and the affi-

¹ *Finch v. Shaw*, 20 Beav. 555. See, also, *Jones v. Creswicke*, 9 Sim. 304; *Geldard v. Hornby*, 1 Hare, 251; 2 Keen, 212; *Ellis v. Griffiths*, 7 Beav. 83.

² *Edwards v. Cuntiffe*, 1 Madd. 287; *Byre v. Hanson*, 2 Beav. 478.

³ *Jones v. Roberts*, McCl. & Y. 567.

⁴ *Ismoord v. Claypool*, 9 Sim. 317, note; *Nanfan v. Perkins*, 9 Sim. 306, note; *Crompton v. Earl of Effingham*, 9 Sim. 311, note; *Jones v. Creswicke*, 9 Sim. 304; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591; *Lee v. Heath*, 9 Sim. 306 note.

⁵ *Gilmour v. Myers*, 2 Cham. Rep. 179.

⁶ *Johnson v. Ashbridge*, 2 Cham. Rep. 251.

⁷ *Scott v. McDonnell*, 1 Cham. Rep. 193.

davit of non-payment by the plaintiff or his agent. This affidavit should negative all receipts of money on account of the mortgage possession, and receipt of rents and profits.¹

The manager of the Bank where mortgage money is directed to be paid, should certify that the money has not been paid before, as well as on or since the day appointed.² The practitioner should take care that the report be confirmed by being filed fourteen days before the day appointed for payment of the mortgage money, otherwise the final order will not be granted, and a new day must be appointed.³ Where the plaintiff in a foreclosure suit resides out of the jurisdiction, and an application is made for a final order of foreclosure, the affidavit of non-payment being made by an agent of the plaintiff, it must be shewn where the custody of the mortgage has been.⁴ And where co-mortgagees are made co-plaintiffs in a foreclosure suit, the affidavit as to non-payment on which to obtain a final order of foreclosure should be made by all of them, as either of the plaintiffs might have received the money.⁵ On an application for a final order for foreclosure, where the affidavit of non-payment of the mortgage money is made by an agent of the plaintiff, it should state that he is authorized to receive the money.⁶ On an application by a company for a final order for the sale of mortgaged property, the affidavit of the officer of the company as to non-payment should shew that he is the proper officer to receive the mortgage money.⁷ Where on an application for a final order for foreclosure, the usual affidavit of the plaintiff shews that he has been in occupation of the property, it must be referred back to the Master to take a new account, set an occupation rent, and appoint a new day of payment, although the plaintiff in his affidavit swears that he has been in occupation merely as care-taker, and has received no rents or profits from the property.⁸ On an application for a final order for foreclosure where the plaintiff resides out of the jurisdiction, and the affidavit as to non-payment of the mortgage money is

1 *Scott v. McDonell*, 1 Cham. Rep. 193.

2 *Farrell v. Stokes*, 1 Cham. Rep. 201.

3 *Mountain v. Porter*, 1 Cham. Rep. 207; and see *Ise v. Smith*, and *Sparkall v. Rogers*, referred to in *Dickey v. Heron*, 1 Cham. Rep. 149-150.

4 *Rae v. Shaw*, 1 Cham. Rep. 209. The same point was decided on the same day in *Sturday v. Lowrey*.

5 *Annis v. Wilson*, 1 Cham. Rep. 217.

6 *Powers v. Merriman*, 1 Cham. Rep. 225. A similar decision was given a few days subsequently by *Spragge, V. C.*, in *Mitchell v. Livingstone*.

7 *Western Assurance Company v. Capreol*, 1 Cham. Rep. 227.

8 *Cummer v. Tomlinson*, 1 Cham. Rep. 235.

made by his solicitor, it must be shewn that the plaintiff has no other agent within the jurisdiction authorized to receive the money.¹

In applying for a final order for the *sale* of mortgaged premises, it is necessary that the usual affidavit of the plaintiff should negative possession, and the receipt of rents and profits.² On an application for a final order for the *sale* of mortgaged property, it is not sufficient for the plaintiff in his affidavit of non-payment to swear merely that he has not been in possession, or in the receipt of the rents and profits, he must also negative possession, and the receipt of rents and profits by any one in his behalf.³ A motion for a final order for the foreclosure of mortgaged property is an *ex parte* proceeding. It is unnecessary to serve notice thereof even on infant owners of the equity of redemption who have answered.⁴ Where on an application for a final order for foreclosure, the usual affidavit is made by the agent of the plaintiff, the authority of the agent need not be produced; as to that it is sufficient for him to swear that he is the duly authorized agent.⁵ Mortgage money had been ordered to be paid on the 19th December; default being made, the usual Bank certificate was obtained on the 20th December, and on 10th February following, an application was made for a final order for sale. *Held*, that the Bank certificate of 20th December, being the only one produced was too old for the court to act upon.⁶ When a party entitled to a final order for foreclosure neglects to apply until nearly two years have elapsed from the time his right to the order first accrued, the order will not be granted *ex parte*.⁷ On an application for a final order for foreclosure the Bank certificate of nonpayment shall be made by the cashier, or other like officer. A certificate of the accountant is not sufficient.⁸

The order of 29th June, 1861, directing money ordered to be paid into some Bank, does not apply to a suit by a vendor to enforce his lien for purchase money. In a suit of this nature in applying for

1 *Taylor v. Cuthbert*, 1 Cham. Rep. 240.

2 *Burford v. Lymburner*, 1 Cham. Rep. 275.

3 *Forb v. Jones*, 1 Cham. Rep. 291.

4 *Henderson v. Cowan*, 1 Cham. Rep. 297.

5 *Radcliffe v. Duffy*, 1 Cham. Rep. 302.

6 *Hurd v. Seymour*, 1 Cham. Rep. 532.

7 *Ardagh v. Orchard*, 2 U. C. L. J. N. S. 303.

8 *Campbell v. Garrett*, 1 Cham. Rep. 256. It was alleged, but not shewn in the affidavits, that the accountant was acting as manager *pro tem*. Had this been stated in the affidavits, the order would probably have been granted.

the final order for sale it is not necessary that the affidavit of the plaintiff as to the nonpayment should negative the fact of possession, or the receipt of rents and profits.¹ Where the plaintiff (a mortgagee) is in occupation of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment; so where it appeared that a mortgagee under such circumstances had been charged with occupation rent, only to the date of the Master's report, and had since continued in possession, the final order was refused.² Where a bill of foreclosure has been filed by the executor and devisees of the mortgagee, and the executor alone attended at the time and place appointed by the Master for payment of the mortgage money to the plaintiffs, as it did not appear that the debts of the testator had been paid, the court considered the plaintiffs entitled to the absolute decree of foreclosure in default of payment.³ It seems that the plaintiff will not be entitled to the absolute order of foreclosure against a subsequent mortgagee and the mortgagor unless he be in a situation to re-convey the legal estate in the mortgaged premises.⁴

On the order being granted, it will be issued by the Registrar. The next step, and the last, is to register it in the County Register office. This is done under the "Registration of Titles [Ontario] Act," and the mode of doing it is this: Obtain from the officer with whom the bill was filed a certificate of the lands as described in the bill, produce this to the Registrar in Toronto, and he will give a certificate of decree of foreclosure; take this to the County Registrar and he will register it; and this completes the title of the mortgagee. He has now the full fee simple untrammelled by the mortgage.

It sometimes happens, however, that after taking the account in the Master's office, and before the final order for foreclosure has been obtained, the mortgagee receives moneys on account, or goes into possession, or collects rents, thus changing the state of the account. This waives the default, and a final order will not be

¹ *Sawdon v. Heasty*, 1 Cham. Rep. 216.

² *Pipe v. Shafer*, 1 Cham. Rep. 261.

³ *Evans v. Parker*, 2 Grant. 555.

⁴ *Ross v. Thompson*, 1 Cham. Rep. 624.

granted until a new account be taken, and a new day of payment appointed. Our Order 457 provides that "Where the state of the account ascertained by an order, or by the report of the Master, is changed by payment of money; by receipt of rents and profits; by occupation rent or otherwise, before the final order for foreclosure or sale is obtained; the plaintiff, or other party to whom the mortgage money is payable, may give notice to the party by whom the same is payable, that he gives him credit for a sum certain to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice." And Order 458, that "Upon the final order for foreclosure or sale being applied for, if the Judge thinks the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the Judge directs notice to be given." Order 459 provides that "The party to whom the mortgage money is payable may apply in Chambers for a reference to a Master, or for an appointment to fix such sums respectively; and in the latter case, either upon notice or *ex parte*, as the Judge thinks fit; and the order to be made thereupon is to be served, or service thereof dispensed with, as the Judge directs." And Order 460 that "the party to whom such notice is given may apply in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid, instead of the amounts mentioned in such notice; or, for a reference to a Master for the like purpose; and in case the Judge thinks a reference to a Master proper, the same may be made *ex parte*, unless the Judge otherwise directs." The object of these orders is to lessen expense, and enable the plaintiff to obtain his final order without the delay of a new reference to the Master, where the account had been changed, but it is not imperative on him to proceed under them, and the cases decided on the former practice are therefore still applicable. It has been held that where, after default, the mortgagee merely enters into possession, it would seem that the default would not be waived, at any rate if the occupation rent be shewn to be less than the amount of interest accrued since the day appointed, so that the account would not be changed.¹

It has been held under the order of June, 1861, which is substantially the same as these orders, that where the account is changed in a foreclosure suit after the Master's report, and a notice of credit is given, such notice shall be given before the day appointed for the payment.¹

III. *Thirdly, where there is a subsequent incumbrancer in a foreclosure case, and he makes default.* In such a case the plaintiff proceeds to obtain a final order of foreclosure against the incumbrancer in the same way as he would in the case of mortgagor and mortgagee simply: having obtained the order, he files a copy in the office of the Master to whom the case stands referred. It will be recollected that the decree issued under Order 441 is to be read as if it set forth the particulars contained in Orders 442 to 454, inclusive, (being the thirteen mentioned in that Order). It is directed by one of these, (Order 452), that "All subsequent accounts are from time to time to be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other party or parties entitled to redeem the mortgaged premises as if specific directions for all these purposes had been contained in the decree."

Proceedings after bringing in order for foreclosure.—File a copy of the final Order with the Master, take out a warrant for service on the mortgagor or defendant by bill, if he has answered or filed a disputing note, which underwrite; "to take subsequent accounts; tax subsequent costs, and settle and sign subsequent report;" serve and proceed on this warrant as already described.

On the return of the warrant, the plaintiff attends with an affidavit stating that since the making of his former affidavit he has received nothing on account, and denying receipt of rents and profits, or (if the fact be so) that he has received money on account, or has been in the receipt of rents, or has been in possession. The Master then proceeds to take the subsequent account in the same way as he did the first one, taxes the costs, has them revised, and signs his report in the manner already described.

In appointing the time for payment, the Master will give the mortgagor only three months; the incumbrancer having had six;

¹ *Knottinger v. Barber*, 1 Cham. Rep. 258.

the case has now become one of mortgagee and mortgagor simply, and the remarks already made as to the practice in concluding the suit in such a case may be applied here.

IV. Fourthly, where there are several subsequent incumbrancers, in a case for foreclosure, and they all make default.

In a case of this description, the report will direct payment in six months by the last incumbrancer of the amount found due to the incumbrancer immediately preceding him; in case of default, a final order of foreclosure must be obtained against the last incumbrancer, a new account is taken, and the last of the remaining incumbrancers is directed to pay the amount found due to the one immediately preceding him in three months, and so on until the mortgagor is reached, who will be directed to pay the mortgagee in three months. In case of payment by any incumbrancer, a new account is taken, and the case is worked out until the mortgagor is reached in the way already described, who is entitled to only three months to redeem.¹

Under the old practice this was all done under separate decrees, but now the practitioner obtains his final order for foreclosure in the manner already described upon each default; and then proceeds, before the Master under the decree upon each successive default, taking the subsequent accounts, taxing his subsequent costs, and filing the report on each occasion, until all the parties are foreclosed; and this he does without resort being had to the court for anything excepting the final order for foreclosure upon each default. Upon each occasion he must furnish before the Master the usual affidavit shewing the state of the account at the time, as has been already mentioned. When the first incumbrancer has been foreclosed, the case becomes one between mortgagee and mortgagor, or their assignees, simply, and the suit is terminated in the mode already described in such a case.

In order to obtain possession, Order 464 provides that "In a suit for foreclosure or for redemption, the mortgagor or other person entitled to the equity of redemption, being in possession of the

¹ See *Ardagh v. Wilson*, 1 Cham. Rep. 380.

premises foreclosed, may be ordered to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be." An application under this order cannot be made *ex parte*. Notice of the intended motion must be served and an order drawn up thereon, which must also be properly served, and possession must be demanded.¹ This order applies only to mortgage cases; the remedy thereby given being intended in lieu of the action of ejectment, which a mortgagee out of possession is prevented from bringing, at the risk of the costs of his proceedings in this court.²

It was held under the Order of 29th June, 1861, (of which Order 464 is a copy) that a mortgagee is not entitled to an order for the delivery of possession as against the tenants of the mortgagor, although such tenancy may have begun after the mortgage was made.³ An order for the delivery of possession is only made against persons not parties, when they acquired possession *pendente lite* from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of receivers and sequestrators.⁴ An order to deliver up possession of mortgaged premises after final order of foreclosure, will not be granted *ex parte*; notice must be served; it is not necessary however to demand possession.⁵ Where more than three years had elapsed between the final order for foreclosure, and an application for the delivery of possession of the mortgaged premises, the court required an affidavit shewing the circumstances of the possession since the final order, and that the defendant had never relinquished possession.⁶ On an application against a mortgagor to deliver possession of the mortgaged premises after a final order for foreclosure, it must be shewn that the mortgagor is actually in possession.⁷ On moving for an order for delivery of possession it must be shewn that the defendant is in possession. No order will be made against a tenant or third party in possession, not a party to the cause.⁸

1 *Neville v. Labadie*, 1 Cham. Rep. 13; see *Lazier v. Ranney*, 6 Grant, 323.

2 *Mavety v. Montgomery*, 1 Cham. Rep. 21.

3 *Bank of Montreal v. Ketchum*, 1 Cham. Rep. 117.

4 *Bank of Montreal v. Wallace*, 13 Grant, 184.

5 *Hodkinson v. French*, 1 Cham. Rep., 201.

6 *Irving v. Munn*, 1 Cham. Rep. 240.

7 *Hodkinson v. French*, 1 Cham. Rep. 223.

8 *McKenzie v. Wiggins*, 2 Cham. Rep. 391.

The fact that an ejectment suit has been brought by the mortgagee, and is pending, is no bar to obtaining the usual order for possession after final order for foreclosure ; but in such a case the order will be granted only on the terms of discontinuing the action at law, and paying the costs of it. A delay of two years after the final order for foreclosure is no bar to obtaining the usual order for possession.¹ Where an application is made by a purchaser for an order against a mortgagor for the delivery of possession of the property, and of the title deeds, notice must be served on the plaintiff (the mortgagee), or if he be paid off to some other party interested in the proceeds of the sale.² Where the decree by oversight contained no direction as to giving up possession, a supplemental order directing the delivery up of possession was made, but on payment of costs. A motion for such an order was considered more properly a motion for court than chambers.³ A motion for delivery of possession must be made on notice.⁴ An application for an order of possession can not be made the means of trying the right to possession between a landlord and his tenant, or a trespasser. Where, therefore, a mortgagor's tenant had attorned to the mortgagee, and afterwards such tenant left the premises, and they fell into the hands of another party, an order for possession against such party was refused.⁵ On a motion for delivery of possession, the court will not, as a general rule, look behind the final order for foreclosure. Where costs were not asked for by the notice, or on argument, and no demand of possession was proved, the order for delivery of possession was made without costs.⁶

Before proceeding to consider the practice in *sale* decrees, it will be convenient to point out the course to be adopted where an incumbrancer redeems the plaintiff, and where a second or other subsequent incumbrancer redeems the first, or any other one prior to himself. The Master has power, under Order 452, to work out the decree in such cases, without resort to the Court. If the first or any other incumbrancer redeems the plaintiff, the carriage of the decree then becomes his as a matter of right. The plaintiff

¹ *Mofatt v. White*, 1 Cham. Rep. 227.

² *Walker v. Matthews*, 1 Cham. Rep. 282.

³ *Mason v. Seney*, 2 Cham. Rep. 30.

⁴ *Buckley v. Ousillette*, 2 Cham. Rep. 439.

⁵ *Scott v. Black*, 3 Cham. Rep. 323.

⁶ *Mills v. Choate*, 2 Cham. Rep. 374.

is bound in such a case, under Order 450, to convey the premises to the party redeeming, or whom he may appoint, free and clear of all incumbrances done by the plaintiff, and to deliver to the party redeeming all deeds and writings in his custody or power relating thereto, upon oath (if required). The party redeeming, after having obtained an order for foreclosure against the incumbrancers prior to him, if any, takes out a warrant, underwriting it, "*A. B., having redeemed the plaintiff; to take subsequent accounts; tax subsequent costs, and settle and sign subsequent report.*" This is served upon the mortgagor if he have answered, or filed a disputing note, and upon all subsequent incumbrancers, but not on the plaintiff, for his interest in the suit has now ceased; nor on any incumbrancers who may have been foreclosed; and on its return the Master proceeds to take the account as in the cases already mentioned, with this exception, that in addition to the statement in the affidavit of the party redeeming, of the amount still due to him on his own original claim, he should state the amount paid on redeeming the plaintiff. He is, however, entitled to claim for the full amount of that claim as proven in the suit, with subsequent interest and costs, without regard to the sum actually paid by him; but he is not entitled to claim more than six per cent. on this amount, although the debt in respect of which he has redeemed may have been drawing more. Therefore, although the mortgage, or other security, which he has paid off may bear ten per cent., the Master will compute subsequent interest on the amount due at the time of the redemption, at the rate only of six; but this interest will be computed on the whole sum paid by the party redeeming, although it includes interest and costs. The Master in his report in this case will give to all the subsequent incumbrancers three months to redeem the incumbrancer who has redeemed the plaintiff, appointing one day and hour for all as before, and in case of redemption by any one of these, the decree will be worked by this second party redeeming, as it was by the party first redeeming.

Setting aside orders for foreclosure, and enlarging the time to redeem.

Where there are several plaintiffs in a suit, and a final order of foreclosure had been obtained by their solicitor, *Held*, that their solicitor could not afterwards move on behalf of the defendants foreclosed, to set aside the order for foreclosure, though two of the plaintiffs concurred in the application, and only the third objected.¹ And where mortgagors had been foreclosed, and the mortgagees had subsequently sold the property, it was held that the mortgagors could not, several years afterwards, move in the suit against the final order of foreclosure, on the ground of irregularity, without having made the purchasers or their assignees parties to the suit.² A decree of foreclosure absolute, drawn up and entered, was set aside at the instance of a purchaser of the equity of redemption, whose interest was acquired after the institution of the suit to foreclose, but without notice of it.³ A foreclosure decree cannot be opened at the suit of a plaintiff, who admits part of the decree, and impeaches the rest.⁴ If the decree of foreclosure has been obtained by fraud or collusion, the Court will open the foreclosure.⁵

Of enlarging the Time to redeem, and of opening the Foreclosure.

The mortgagor may be relieved from the strict terms of that part of the decree in a foreclosure suit which directs payment of the redemption money on a certain day, either by a postponement of that day, or by an actual opening of the foreclosure, after the day has been suffered to pass without payment. The application is made on motion by the person entitled to redeem, or it may be made at the hearing of a special application, by the mortgagee, to make the foreclosure absolute.⁶

It is only in a foreclosure suit, as a general rule, and not in a suit for redemption, that this indulgence is granted; because in the latter case, the mortgagor comes to the court for relief, professing that his

¹ *Boulton v. The Don and Danforth Road Company*, 1 Cham. Rep. 329.

² *Ibid*, 1 Cham. Rep. 335.

³ *Hilliard v. Campbell*, 7 Grant, 96.

⁴ *Patch v. Ward*, 11 W. R. 135; 7 L. T. N. S. 413.

⁵ *Loyd v. Mansell*, 2 P. Wms. 73; *Gore v. Stackpole*, 1 Dow. 18; *Harvey v. Tebbutt*, 1 J. & W. 197.

⁶ *Clay v. ———*, 9 Sim. 317, n.; *Lee v. Heath*, id. 307, n.; *Alden v. Foster*, 5 Beav. 502.

money is ready, but, in a foreclosure suit, he redeems by compulsion.¹ So the mortgagor will not be suffered to redeem after the day appointed in a redemption suit has passed, and before any order has been made to dismiss the bill, though he tender the principal and interest due to the day of the tender.² But it seems, that, on special circumstances, this relief can also be had in a suit for redemption.³

Upon good cause shown, the court does not stop at a single enlargement. Relief has been given three, and even four times in succession, and this, although the time fixed by previous orders of enlargement have been thereby expressed to be peremptory, and even though the mortgagor have undertaken, by signing the Registrar's book, not to ask for any further time.⁴

But the time is not enlarged, as of course, even upon the first application. Some reason (though a very strong one is not necessary) must be given ; as that the defendant has used his best endeavours to find an assignee without success, but that if time be granted there is a reasonable prospect of getting the money ;⁵ or that negotiations for that purpose are actually pending. And the magnitude of the sum involved, and of the arrears of interest, are circumstances to which weight will be given, but not it seems to the latter, if the arrears have been suffered to increase.⁶

But something more than this seems necessary upon subsequent applications ; such as evidence⁷ that some steps have been actually taken, as the result of which the money is likely to be forthcoming. And a strong case of unexpected delay or difficulty must be made out to support a third or fourth application.

Under the usual circumstances of an application by the mortgagor, by reason of his being unable to raise the money in time, it is necessary to show that the estate is an ample security for the debt,⁸ which fact was formerly stated on the face of the order.⁹

1 *Novosielski v. Wakefield*, 17 Ves. 417.

2 *Faulkner v. Bolton*, 7 Sim. 319.

3 *Typpling v. Haues*, 10 Aug. 1810, cited 17 Ves. 417.

4 *Anon.*, Barn. Ch. 221 ; *Edwards v. Cunliffe*, 1 Mad. 287.

5 *Nanny v. Edwards*, 4 Russ. 124 ; *Eyre v. Hanson*, 2 Beav. 478.

6 *Holford v. Yate*, 1 Kay & Jo. 677.

7 *Edwards v. Cunliffe*, 1 Mad. 287.

8 *Eyre v. Hanson*, 2 Beav. 478 ; *Edwards v. Cunliffe*, 1 Mad. 287 ; *Nanny v. Edwards*, 4 Russ. 124 ;
Anon., Barn. Ch. 221.

9 *Geldard v. Hornby*, 1 Haro, 251.

Where, however, a necessity for enlarging the time has arisen from the opening of the account by the act of the mortgagee, the order will be made, although the security appear on the evidence to be of doubtful sufficiency; but care will be taken that nothing is added by the delay to the amount of the debt.¹

The period granted upon the first application is usually six months, and it does not appear, that any longer time has been granted at once. The like period has also been given on a subsequent application, but the usual period has then varied from five to three months, according to the circumstances.

The order commonly directs, that the time be enlarged upon payment² by the mortgagor to the mortgagee, on or before the day originally fixed for payment of the the principal, interest, and costs of the amount certified to be due for interest and costs on the mortgage; but where the large sum of 8,000*l.* was due for interest, the first order was made on payment of 3,000*l.* only on account of interest.³ The general condition of payment of interest will not be relaxed by reason of the infancy of the person entitled to redeem.⁴ But if, from the circumstances of the case, or the shortness of the interval between the time of application and of payment under the decree, there is likely to be a difficulty in making the payment in due time, the Court will direct enlargement on payment of the interest and cost in a month, or some other convenient time from the date of the order.⁵ And if there be any doubt as to the sufficiency of the security, the condition will also be imposed of immediate payment of the interest to accrued due down to the day fixed for the ultimate payment of the mortgage debt.⁶

If the time fixed for payment be likely to expire before the hearing of exceptions [objections] to the report [certificate] which fixes the time of payment, the court will either enlarge the time on the usual application, or⁷ if the defendant omit to apply, a new day will be appointed, even after the exceptions [objections] have been overruled.

¹ *Geldard v. Hornby*, 1 Hare, 251.

² *Edwards v. Cunliffe*, 1 Mad. 287; Seton, 197, Ed. 2.

³ *Holford v. Yates*, 1 Kay & Jo. 677.

⁴ *Coombe v. Stewart*, 18 Beav. 111.

⁵ *Byre v. Hanson*, 2 Beav. 473; *Geldard v. Hornby*, 1 Hare, 251.

⁶ *Geldard v. Hornby*, 1 Hare, 251.

⁷ *Removize v. Cooper*, 1 Sim. & St. 364.

Where the right to redeem is in dispute, and time is required to prosecute an appeal, the object of the court is to make an order, which, without touching the decree, will yet secure to the person redeeming the recovery of the money which the decree requires him to pay. In such a case¹ the terms imposed will be the payment into court of principal and arrears of interest, consent to a receiver, and payment of interest from the filing of the bill, or payment of principal, interest, and cost of suit and of the application. The amount paid in will be ordered to be invested at the risk of the applicant;² and if the dividends or any interest be ordered to be paid to the mortgagee it will be upon his undertaking to repay the same upon the reversal of the decree.

It appears to have been hinted, that the mortgagee's refusal to produce the title deeds for the mortgagor's inspection, although the court would not order such production, would be a good reason for enlarging the time;³ but this opinion, if it were really expressed, seems open to great doubt.

The order will in all cases proceed to foreclose the mortgagor upon non-payment at the appointed time of the sum, upon the conditional payment of which the order is made.⁴ And if the condition be not complied with the order of foreclosure absolute may be made as of course, and its discharge has been refused⁵ with costs, though it was sworn to have been obtained by surprise during a treaty between the parties, and notwithstanding an affidavit by the tenant in possession, that he was willing to purchase the estate for more than twice as much as was due on the security. But the order will be discharged if the mortgagee by his own act (as by receiving rent) vary the amount due between the date of the certificate and of the order absolute.⁶

The court will also appoint a new day for payment of the mortgage debt, after default has been made on the day first fixed; and even after enrolment of the decree, or of the order absolute for fore-

1 *Monkhouse v. Corporation of Bedford*, 17 Ves. 380; *Finch v. Shaw*, 20 Beav. 555; and see *Holford v. Yates*, 1 Kay & Jo. 677.

2 *Finch v. Shaw*, 20 Beav. 555; see *Taylor v. Waters*, 1 Myl. & C. 295.

3 *Per Lord King*, Mos. 246.

4 *Edwards v. Cunliffe*, 1 Mad. 287; *Eyre v. Hanson*, 2 Beav. 478, and other cases.

5 *Jones v. Roberts*, McClel. & Y. 567.

6 *Holford v. Yates*, 1 Kay & Jo. 677; see statement of the case.

closure.¹ And this has been done in favour of the heir of the mortgagor, where the latter was foreclosed on his own consent, given by signing the registrar's book.²

But then the applicant must not only show that he will be able to redeem, if further time be given, but he must also account satisfactorily for non-payment at the proper time.

The expectation that the money will be ready, founded upon a treaty already commenced with a proposed assignee; ignorance of the confirmation of the master's report; misinformation as to the day fixed for payment; irregularity in the proceedings of the suit, prior to the order absolute; the illness, or accidental inability to travel, of the person charged with payment of the money, and poverty, which could be shown to be but temporary, are matters which in the various cases³ have been admitted as reasons for granting further time, after the enrolment of the decree for foreclosure.

The order to enlarge the time after enrolment of the order absolute, will be made without vacating the enrolment, and may therefore, it is said, be made by a *puisne* judge, without leaving room for the objection that it affects an order of the Lord Chancellor.⁴

The time of payment may also be postponed, by reason of some act done by the mortgagee; as if, being in possession, he receive rents, or other moneys on account of the estate, after the sum due has been certified,⁵ because the amount being then varied, the account must be carried on, and a new day fixed for payment. This may be done on the motion of either of the parties. And if the person entitled to redeem make objection, the mortgagee will not be suffered to verify by affidavit the amount received, and pay

¹ *Cocker v. Bevis*, 1 Ch. Ca. 61; *Ismoord v. Claypool*, 9 Sim. 317, n.; *Nanfan v. Perkins*, 9 Sim. 306, n.; *Crompton v. Earl of Eppingham*, id. 311, n.; *Jones v. Crenwicke*, id. 304; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591; *Lee v. Heath*, 9 Sim. 306, n.

² *Adney v. Wordsworth*, 9 Sim. 317, n.

³ See the cases cited above, and see *Joachim v. McDouall*, 9 Sim. 314, n.; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591.

⁴ *Ford v. Wastell*; *Thornhill v. Manning*, 1 Sim. N. S. 451 where it is said to have been Sir J. Wigram's impression that the enlargement leaves the order absolute untouched (and see *Ismoord v. Claypool*, 9 Sim. 317, n.) But Sir J. Wigram said, that the order should be to vacate the enrolment and discharge the order absolute on condition of payment, and on non-payment the order absolute to stand. See also *Crompton v. Lee*, 9 Sim. 311, n.; *Nanfan v. Perkins*, id. 308, n.

⁵ *Gerrick v. Jackson*, 4 Beav. 154; *Alden v. Foster*, 5 Beav. 502; *Ellis v. Griffiths*, 7 Beav. 83.

it over at once.¹ The mortgagee is not on the other hand entitled to any right to postpone redemption, after the day fixed for payment, until payment by the person redeeming, of sums which have been subsequently added to the debt, in respect of another security; because this would be to alter a decree upon an interlocutory application.²

It seems also, that it is not the practice³ to put the person redeeming, upon terms of immediate payment of the interest and costs, when the time is thus enlarged by reason of the act of the mortgagee; but the order has been made in that form,⁴ where there was a doubt as to the sufficiency of the security.

The foreclosure may also be opened by the act of the mortgagee,⁵ if he sue the mortgagor upon his covenant or bond, where the estate proves insufficient to satisfy the mortgage debt. And this, though the decree have been signed and enrolled.⁶

The mortgagee, it will be remembered has a general right to enforce all his remedies at the same time. Now, if he proceed first upon his covenant or bond, and obtain part payment of his debt, he may still foreclose for the residue; but, if he proceed by foreclosure first, and then, finding the estate insufficient to satisfy the debt, goes on to sue upon his covenant or bond for the deficiency, equity will only permit him to do this, upon giving a new right of redemption to the mortgagor; for if the mortgagee take his legal remedy first, the mortgagor retains his right to redeem, and the mortgagee ought not by electing to take the estate first, to be able to get both it and the debt.

And the rights of the mortgagor and mortgagee being correlative, the latter is not entitled to sue for the deficiency after foreclosure, unless he can give to the mortgagor his reciprocal right of redemption. So that if, by selling the estate to a stranger, the mortgagor be prevented from redeeming, equity will also deprive the mortgagee of his right to sue for the deficiency, and will not suffer him to set

1 *Buchanan v. Greenway*, 12 Beav. 355; but see *Ozenham v. Ellis*, 18 Beav. 598.

2 *Barron v. Lancofield*, 17 Beav. 208.

3 *Buchanan v. Greenway*, 12 Beav. 355, and other cases above.

4 *Geldard v. Hornby*, 1 Hare, 251.

5 *Cook v. Sadler*, 3 Vern. 235.

6 *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317.

up his own act, as a reason for suing, without giving a new right of redemption.¹

It seems consistent with this principle, that if the estate have been put up for sale, and bought in by the mortgagee, or a trustee for him, the rights of the parties should remain as if there had been no sale: because the estate, or the power of reconveyance remains in the mortgagee, and redemption can still be had. It seems, in fact, to have been the opinion of Lord Thurlow, in such a case, that the mortgagee might proceed at law, and an offer was made to continue the injunction against the judgment, if the plaintiff would bring the money into court. But the bill of the mortgagor was not directly for redemption, but only for delivery of the bond, and for an injunction against the judgment; and it was not said, whether or not the condition of redemption should be attached to the right to sue.²

In a note supposed to have been made by Richards, C. B.,³ when at the bar, it is said to have been held in this case, that the mortgagee may sell, and also sue on his bond, there being no reason why a lender should lose part of his debt, and not be able to enforce his additional security. But this strikes at the whole rule, which, permitting the mortgagee to sue first, and then to foreclose, restrains him from suing after foreclosure, without giving a new right to redeem; a rule which is consistent with equity, and a proper check upon speculating mortgagees. The lender has ample means of security. He is not bound, at the outset, to lend his money upon an estate of the sufficiency of which he cannot assure himself. Before the foreclosure is complete he may use all his remedies at once, and if he foreclose he has a chance of profit. Why then should he complain, if the estate turn out of less value than the debt? It has been said,⁴ that until the estate be sold he cannot tell its value, and therefore does not know whether his debt be satisfied or not. But, if a purchaser out of possession can judge of the value of the estate to buy, the mortgagee in possession can surely form as good an estimate.

1 *Lookhart v. Hardy*, 9 Beav. 349; and see *Tooke v. Hartley*, 2 Bro. C. C. 125; 2 Dick. 735; and *Perry v. Barker*, 8 Ves. 527, and 13 id. 198.

2 *Tooke v. Hartley*, 2 Bro. C. C. 125. The correctness of the report has been disputed, and the confusion of the arguments as stated is such, that there cannot be said to be any clear authority on the point.

3 See 2 Bro. C. C. Bell's ed.

4 *Lloyd v. Mansell*, 2 P. Wms. 73.

The foreclosure will also be opened if the decree have been obtained by false evidence,¹ or other fraudulent or collusive² practice ; as other decrees are set aside under the like circumstances.³

So an estate was held⁴ to be redeemable, notwithstanding a release of the equity of redemption, more than twenty years old, and a decree of foreclosure by consent, more than five years old, signed and enrolled ; because the release was made upon a secret trust to pay the mortgagor an annuity, the land being also of much greater value than the debt. And after sixteen years a decree has been opened,⁵ under the concurrent circumstances of a great excess in the value of the estate, and the distressed condition of the mortgagor ; the last circumstance being probably an indication of oppression on the mortgagee's part ; for the court is generally unwilling to open a foreclosure after long acquiescence, especially if buildings or other improvements, or settlements, have been made on the faith of the decree, and where the foreclosure has been by consent ; and has refused such relief after six years.⁶

The decree will not be opened after it has been signed and enrolled, on the mere ground of the overvalue of the estate (though it has been said that a sale at an undervalue would be a substantial objection on a bill to set aside the sale),⁷ or of parol declarations concerning the mortgage if there be no fraud.⁸ And a bill so filed for redemption, on the ground of parol declarations by the mortgagee, both before and after the decree, that he was willing to take his money, the fraud being denied, was dismissed with costs.⁹

Nor can a mortgagor be relieved against a decree of foreclosure, obtained by consent upon unwritten terms, alleged to have been agreed upon by the solicitors of both parties, and with which the mortgagee afterwards refused to comply, by a suit for performance

¹ *Lloyd v. Mansell*, 2 P. Wms. 73.

² *Harvey v. Tebbutt*, 1 J. & W. 197.

³ *Gore v. Staapools*, 1 Dow. 18.

⁴ *Morley v. Blways*, 1 Ch. Ca. 107.

⁵ *Burgh v. Langton*, 15 Vin. 476.

⁶ *Tooke v. Bishop of Ely*, 15 Vin. 476, note to pl. 1 ; *Lant v. Crip*, id. 469 ; *Fleetwood v. Jansen*, 2 Atk. 467 ; and see *Thornhill v. Manning*, 1 Sim. N. S. 451 ; and see *Jones v. Kendrick*, 2 Eq. Ca. Abr. 602.

⁷ Per Lord Manners, C., *Lightburne v. Swift*, 2 Ba. & Be. 207.

⁸ *Whishall v. Short*, 7 Vin. 397.

⁹ *Roscarriek v. Barton*, 1 Ch. Ca. 218.

of the agreement : parol evidence of the terms of the agreement being inadmissible : but it seems, that upon sufficient parol evidence, the foreclosure might have been opened, on the ground that the agreement concerned an order of court, and was made by persons competent to agree upon its terms.¹

The foreclosure will not be opened, by reason that the mortgage has been mentioned by the mortgagee in his will as a debt,² as mortgage money, or as an interest in property mortgaged to him;³ but the property will pass by the will, according to the actual interest of the testator.

The circumstance that a decree for sale, erroneously directs payment of the surplus money to the tenant for life, will not be a reason for opening the decree after a lapse of some years, if the sale have been fairly conducted, and there were in fact no surplus;⁴ though the objection would have been substantial, if a surplus had really been paid to the tenant for life; and redemption may be afterwards decreed of an estate which has been sold by the mortgagee, under his power, if due notice were not given according to the deed.⁵

If the mortgagor have not insisted at the hearing of a foreclosure suit, or on the taking of the accounts, upon his right to redeem, he ought not to be admitted to redeem afterwards, except upon new matter. .

And upon filing a bill for redemption, after he has acquiesced in a foreclosure decree, the time for redemption under that decree ought not to be enlarged on motion; because,⁶ notwithstanding the foreclosure, the plaintiff will have the benefit at the hearing of any equity which may arise upon his redemption bill.

If an incumbrancer who seeks to open the foreclosure and to redeem, on the ground that he was not a party to the suit, be in an obscure station and his means doubtful, he will be ordered to give security for costs in case he do not redeem.⁷

¹ *Cos v. Peale*, 2 Bro. C. C. 334.

² *Tooke v. Bishop of Ely*, 15 Vin. Abr. 476, n., pl. 1; 2 Eq. Ca. Abr. 608.

³ *Siberschildt v. Schiott*, 3 Ves. & B. 45; *Legros v. Cockerell*, 5 Sim. 384.

⁴ *Lightburne v. Swift*, 2 Ba. & Be. 207.

⁵ See *Smith v. Fox*, 6 Hare, 398.

⁶ *Fleetwood v. Jansen*, 2 Atk. 467.

⁷ *Bird v. Gandy*, 7 Vin. Abr. 45, pl. 20; 2 Eq. Ca. Abr. 251, n.; and see *Stevens v. Williams*, 1 Sim. N. S. 545.

The Court will not interfere to open foreclosure in aid of a defendant who has been guilty of laches, and shows no effort made on his part to avoid foreclosure or save his estate.¹ Where a purchaser of the equity of redemption paid the amount found due to the plaintiff, it was held that this was a payment by the defendant, or some one on his account, and the final order of foreclosure was set aside.²

V. *Fifthly, where in case of a decree for sale, there are no incumbrancers.*

If in a suit for sale of the mortgaged premises, there be no incumbrancers, a sale takes place after the expiration of the six months given by the report, the proceedings to obtain an order for sale after default are the same as those in obtaining an order for foreclosure. When obtained, the plaintiff brings it into the Master's office, and files a copy; but the practice under it will be considered in another place. It may here be noticed that on moving for an order absolute to sell for default of payment of the sum found due by the Master, it need not be shown that any incumbrancer, besides the plaintiff, attended at the time appointed by the Master for payment of the several incumbrancers.³

VI. *Sixthly, in a similar case, where there are incumbrancers, and they all make default, or where one redeems.*

Sale decrees differ from those for foreclosure in this, that the Master enquires as to all incumbrances as well prior as subsequent to the plaintiff, (other than prior mortgages), and the report appoints one day and hour for the debtor to pay all the claims. In default of payment, the plaintiff after obtaining the final order for sale, as already mentioned, proceeds to sell in the way to be described. If the debtor should pay off the plaintiff, any incumbrancer may obtain the carriage of the decree, and proceed to sell for the benefit of himself, and any other unpaid one, as the decree inures to the benefit of the creditors until they are all paid, or the property is sold, and the proceeds distributed.

¹ *Brothers v. Lloyd*, 2 Cham. Rep. 119.

² *Reid v. Cooper*, 2 Cham. Rep. 90.

³ *Irvine v. Whitehead*, 1 Cham. Rep. 10.

It may here be remarked that Order 456 provides that, "An incumbrancer made a party in the Master's office, and entitled to, and desiring,¹ a sale of the mortgaged premises, is to make the necessary deposit therefor, before the Master's report is settled, whereupon the Registrar is to issue an order on *præcipe*, directing a sale of the mortgaged premises, instead of a foreclosure, and thereupon the Master is to compute subsequent interest, and appoint a time and place, or times and places for payment, and all subsequent proceedings are to be taken and had as if the decree had been in the first instance a decree for sale." A sale, however, will not be ordered at the instance of subsequent incumbrancers until after the mortgagor has had the usual time to redeem.²

Proceedings under an Order for Sale.

Order 453 provides that "If the decree directs a sale instead of foreclosure on default in payment, then a default being made and an order for sale obtained, the premises are to be sold with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ about the same, and the purchaser is to pay his purchase money into court, to the credit of the cause subject to the further order of the court." And Order 454 that "The purchase money, when so paid in, is to be applied in payment of what has been found due to the plaintiff and the other incumbrancer or incumbrancers, (if any), according to their priorities, together with subsequent interest and subsequent costs when computed and taxed by the Master." Order 374 provides that "Where a sale is to take place under an order of the court, no copy of the order, or any part thereof, is to be brought into Chambers, or the Master's office, but the original order is to be used, unless the Judge or Master requires a copy." It is usual and more convenient to have a copy on file, upon its being brought into Chambers, or the Master's office. And Order 375 provides that "An appointment or warrant in respect of the sale is to be obtained from the Judge or Master, and served upon all necessary parties."

¹ See Order 429, and *ante* as to the incumbrancer's right to a sale.

² *Trust and Loan Company v. Reynolds*, 2 Chanc. Rep. 41. In this case the subsequent incumbrancers had made default in payment according to the Master's report, and did not apply until after the default had occurred.

The necessary parties are, the defendants by bill who have answered or filed a disputing note, and all parties who have proved claims under the decree. The warrant is underwritten. "To settle advertisement of sale under decree dated———." Order 876 provides that "At the time appointed thereby, the party having the conduct of the sale is to bring into Chambers or the Master's office, a draft advertisement, but no particulars or conditions of sale, or any draft or copy thereof." And Order 877 that "The advertisement is to contain the following particulars:

- "I. The short style of cause.¹
- "II. That the sale is in pursuance of an order of the court.
- "III. The time and place of sale.
- "IV. A short and true description of the property to be sold.
- "V. The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots.
- "VI. What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with or without interest.
- "VII. Any particulars in which the proposed conditions of sale differ from the standing conditions."

Advertisements for sales under the direction of the court should be as short as possible, the short style of the cause, and a short description of the property and improvements is sufficient, and no merely formal parts such as convey no information to intending purchasers should be inserted therein.²

An advertisement for the sale of property under decree, should set out all the improvements on the property, otherwise it will be referred back to the Master to re-settle the advertisement, and appoint a new day for sale.³

¹ It may here be noticed that Order 507 provides that, "In all proceedings in a cause, except bills, petitions in the nature of bills, decrees, and decretal orders, the following short style of cause shall be sufficient: "*Between John Smith and others, plaintiffs, and Richard Roe and others, defendants.*" In case of proceedings which it has been the practice to entitle more shortly, thus, "*Smith v. Roe,*" such practice is to continue.

² *Baxter v. Finlay*, 1 Cham. Rep. 230.

³ *Heward v. Ridout*, 1 Cham. Rep. 244.

Where the title or the proof of it is involved in no difficulty, a condition of sale that "*The vendor is not to be bound to give any evidence of title, or any title deeds or copies thereof, other than such as are in his possession, or procure any abstract,*" was held to be very objectionable, and should not be sanctioned by Masters even by consent,¹ The duty of the Master in settling conditions of sale is well pointed out in this case.

Order 378 provides that "At the time named in the appointment or warrant, the Judge or Master, is to settle the advertisement, to fix the time and place of sale, to name an auctioneer, where one is to be employed, and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement, and all the before mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant, where it is practicable, and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it is unavoidable."

Under a decree for the sale of land or a competent part thereof, it is the mortgagor's duty to see to the parcelling out of the lands directed to be sold, and if the mortgagor considers that too much is offered, he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that the unsold lots will be withdrawn from sale when the debt is realized, if that course is intended to be taken. The confirmation of a sale may be opposed before the Master, and the sale disallowed on grounds which would afford material for a motion to set aside the sale. Where the confirmation of a sale is opposed on the grounds of there having been an unnecessary number of lots sold, the purchaser should be notified. *Semble*, the objection will not prevail against an innocent purchaser, when urged against the confirmation of the report on sale.² Where a party interested in the equity of redemption is dead, and his heirs are out of the jurisdiction and unknown, the court has jurisdiction in a suit by the first mortgagee against a subsequent mortgagee and the Attorney-General, to direct a sale of the property, and the proceeding cannot afterwards be set

¹ *McDonald v. Gordon*, 2 Cham. Rep. 125.

² *Beatty v. Kadenkurst*, 3 Cham. Rep. 344.

aside by the heirs except for error or fraud. In such a case the conditions of sale must state these circumstances.¹

The particulars of the advertisement should be verified by affidavit, and in strictness the fitness of the proposed auctioneer should be verified by affidavit, but this is not done in the case of an auctioneer who has been habitually employed in conducting chancery sales, and whose qualifications are well known to the Master. Where an estate was sold under the decree of the court, and in the conditions of sale it was stated erroneously that the property was subject to dower, when in reality the dower attached to the equity of redemption only, in consequence of which the property brought a much less sum than it otherwise would, a re-sale was ordered on the application of the executors of a party who had been surety to the creditor, at whose instance the sale was had, and under the circumstances, the costs of the application were ordered to be charged upon the estate.² Order 379 provides that, "The standing conditions of sale are to be those set forth in Schedule P. to the consolidated General Orders," and Order 380, that "The Judge or Master may, without further order, fix an upset price, or reserved bidding, where it is thought expedient, but this must be done at the meeting before mentioned, and it must be notified in the conditions of sale." In settling the terms and conditions of a sale under a decree, the plaintiff who had the conduct of the sale, had omitted to ask for a reserved bid, and the Master issued his advertisement. On a motion to the Judge in Chambers, liberty to have a reserved bid was granted, and the Master's advertisement of the terms and conditions of sale, altered in accordance therewith, on payment by the plaintiff of the costs of the application.³

A purchaser at sale under Order of this Court was held liable for interest from the time of his purchase, although delay had taken place in perfecting the title for which he was in no way responsible; such delay, however, not being caused by any fault of the vendors, the conditions of sale stipulating for the payment of interest *from the day of sale*. *Semble*, in the absence of such stipulation in the conditions of sale, the Court would relieve the purchaser from the

¹ *Smith v. Good*, 14 Grant, 444.

² *Jones v. Clarke*, 1 Grant, 368.

³ *Fraser v. Bens*, 1 Cham. Rep. 71.

payment of interest, where the delay was not of his causing. Such a stipulation in the conditions of sale is not to be approved of.¹

In order to prevent a sacrifice of property, it is usual for the Master to fix either an upset price or a reserved bid. If an upset price be thought desirable, the party conducting the reference produces on the attendance upon the warrant to settle the advertisement an affidavit of a competent person, who is acquainted with the property and its value, shewing its fair value on the terms of sale proposed. The Master adopts the sum thus stated, and states in the advertisement that the premises will be put up at an upset price of \$. It sometimes happens that some of the parties interested object to the valuation shewn by the plaintiff or party conducting the sale; in such a case the Master will give them an opportunity of filing counter affidavits, or of giving *viva voce* evidence, and, if necessary, will adjourn the warrant for this purpose. Another mode of preventing a sacrifice is by a reserved bill. This, however, is a very unsatisfactory proceeding and is rarely adopted, —the chief objection to it being its secrecy, which is very likely to render the sale abortive. If, however, the Master thinks it advisable to fix a reserved bill, he must mention the fact in the advertisement. The party conducting the sale files the affidavit of a competent person, acquainted with the property and knowing its value, or furnishes the Master with *viva voce* evidence as in the case of an upset price being fixed. The Master determines from this evidence the amount at which the reserved bill is to be fixed, but he is not at liberty to communicate the sum upon which he has determined to any of the parties interested. He writes a memorandum addressed to the auctioneer telling him that a reserved bill of \$. . . has been fixed by him—this is delivered under a sealed cover to the auctioneer at the time appointed for the sale, and is not to be opened until after the bidding is concluded; as soon as this is done, and not until then, the auctioneer opens the missive from the Master, and if he finds that the bidding has exceeded the bill reserved by the Master, the property is considered as sold, but if not, the sale has become abortive, and the auctioneer informs the audience that the property has been bought in on account of the persons interested in it. The

¹ *Re Thompson, Bigger v. Dickson*, 2 Cham. Rep. 196.

great objection to this mode of proceeding is that the audience do not know at what sum the property can be bought, and a bidder may, therefore, stop bidding within a small sum of the reserved bid, while, had he known how high he must go in order to secure the property, he would have increased his bid, and thus prevented the sale from becoming abortive. The reserved biddings must not be opened until the time of the sale, and should not be divulged to any person either at, or at any time after the sale. Where property, however, was (in consequence of there being no bidding equal to the price reserved) declared not sold, and the price reserved was afterwards disclosed to a person present who agreed to purchase the estate at the reserved price, the Court held that he could not repudiate his purchase.¹

The Master, having settled the advertisement, makes the following entry in his book :

1868.	}	Mr.'s warrant to settle advertisement
A. B.		for sale under Order dated.....attended by
v.		him for plaintiff; Mr.for defendant. The
C. D.		following parties have been served with the war-
2nd January.		rant, but do not attend :

E. F.....Served 14th December.

G. H..... " " "

Settled advertisement for sale to take place on.....at the auction-rooms of T. N. B., in Hamilton, at noon. I direct it to be inserted once in each week for the four weeks immediately preceding the.....(*being the day appointed for the sale*) in the.....(*naming a paper published in the vicinity of the property, and usually one published in the town where the sale is to take place. Sometimes where the property is very valuable, such as a mill, hotel or factory, the Master directs publication in a Toronto paper—the object of the Master being to give as much publicity to the sale as the owner would himself desire*). And I direct that.....posters be put up in.....(*the town where or near which the property is situated*), and that.....be put up in the vicinity of the premises.

¹ *Elee v. Barnard*, 6 Jur. N. S. 261.

I fix the auctioneer's fee at not more than \$.....(*the sum heretofore usually allowed by some of the Masters has been excessive. The allowance should not be less than \$5 nor more than \$20, except on very large sales*).

The auctioneer is not entitled to a per centage. He can recover no more than the sum named by the Master, and if he should refuse to make the necessary affidavit of the sale the Court will attach him; when he undertakes the sale he becomes an officer of the Court, and is bound by its directions. A duplicate of the advertisement, as settled, should be filed; the other is taken to the printer by the plaintiff's solicitor, who also takes care that the posters are properly printed and distributed. The posters are a copy of the advertisement. It is the practice in England for the Chief Clerk to settle also the conditions of sale, but this is not to be done here,¹ excepting in so far as they appear in the advertisement. Order 382 provides that "The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the Judge or Master appointed at the meeting before mentioned" — in Order 378.

It may here be noticed that each party interested in the process of the sale has a right to the sale being a cash one; but this right is frequently waived, and, by consent, time for payment of a portion of the purchase money is given, and a mortgage taken securing it at such rate of interest as may be thought reasonable.

The advertisements having been duly published and the posters distributed, the property is put up for sale by the person appointed. Order 383 provides that "The Master, or his Clerk, is to conduct the sale where no auctioneer is employed." It is usual, however, to employ an auctioneer, and one of the Judges is said to have intimated that this mode is the more satisfactory one. In England, a bidding paper is used in which each bid is entered as made, and this is signed by the bidder; but this practice is not adopted here. Order 384 provides that "Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale."

¹ Con. G. O. N. 376.

The solicitor conducting the sale is entitled to a fee for attending and managing it; and although any other party may attend, no costs will be taxed to him. It sometimes occurs that it becomes important that the sale should be adjourned;—if this be desired before the time appointed, it is usual for the party conducting the sale to obtain from the Master permission to publish a notice of the adjournment along with the advertisement in the newspaper. In strictness, this permission should not be given *ex parte*, for the delay might be injurious to other parties interested. Sometimes the adjournment is desired to be made at the time of sale; in such a case, the practice is for the party conducting the sale to desire the auctioneer to announce the adjournment, naming the time fixed, and obtain from the Master, as soon after as possible, his ratification. This practice saves the expense of a personal attendance by the Master, and also that of settling a new advertisement. In cases of such adjournments, the Master will direct the same notice of the adjournment be given by publication in a newspaper or by posters. It is not to be understood, however, that these informal proceedings would be sanctioned if objected to by an interested party;—they are convenient and save expense, and no solicitor would object to them unless there were material interests prejudicially affected by them. Where a sale is put off, a note of such postponement at the foot of the old advertisement will suffice, without incurring the expense of a fresh advertisement.¹

Order 381 provides that “All parties may bid, without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents and other persons in a fiduciary situation; and where any parties are to be at liberty to bid, it must be notified in the conditions of sale.” Leave was given to the plaintiff to bid at the sale without taking from him the carriage of the decree, where he was the first incumbrancer, and the property clearly insufficient to pay his demand.² A mortgagee having bid at the sale of the mortgaged property, and became the purchaser without having obtained an order previously for leave to bid, the Court granted him an order *nunc pro tunc*.³ Although it is the

¹ *Thompson v. Milliken*, 15 Grant, 197.

² *Steele v. Davonsport*, 11 Ir. Eq. Rep. 339.

³ *Ex parte Pedder, Re Hadwen*, 3 Dea. & Ch. 622.

usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale where the mortgagee has purchased the property without such leave, if the purchase has been made by him *bona fide*.¹ These cases, however, seem to conflict with the practice which has been adopted in our Court, where, if the mortgagee having the conduct of the sale desires to bid, he transfers it to another party, or applies to the Court for leave to bid. It would seem that Order 381 is not merely directory, and that it can be varied in its application only by the special order of the Court first obtained for the purpose;—it is clear that the Master has no power to make any provisions under this Order which are not strictly within its terms; and it has been held as the settled rule of the Court, that the plaintiff or his solicitor cannot bid at a sale under a decree without the leave of the Court; and non-compliance with this rule will vitiate the sale.²

Any party to the suit who desires to become a purchaser at the sale should obtain a previous order giving him leave to bid at the sale.³ The sale will not, however, necessarily be set aside because he has bid without leave.⁴ Leave to bid will not be given to the party conducting the sale;⁵ nor to a receiver in the cause;⁶ nor to a guardian *ad litem* of a party;⁷ nor to the trustee of the estate, or the executors of the testator in the cause, unless all parties who are *enui juris* consent, and the Court is satisfied that it will benefit the sale.⁸

Order 385 provides that “The deposit is to be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and is to be forthwith paid by him into Court.”

Order 386 provides that, “After the sale is concluded, the auctioneer, where one is employed, is to make the usual affidavit according to the present practice; and where no auctioneer is employed, the Master or his Clerk is to certify to the same effect.”

¹ *Ex parte Ashley, Re Bell*, 3 Dea. & Ch. 610.

² *Popham v. Exham*, 10 Ir. Ch. 440.

³ *Ehworthy v. Billing*, 10 Sim. 94.

⁴ *Wilson v. Greenwood*, 10 Sim. 101, n.

⁵ *Domville v. Berrington*, 2 Y. & C. Ex. 723; *Sidney v. Ranger*, 12 Sim. 118-120; *Ex parte McGregor*, 4 De G. & S. 603.

⁶ *Alvine v. Bond*, 1 Flan. & K. 316.

⁷ *Dodson v. Bishop, Seton*, 1184.

⁸ *Campbell v. Walker*, 5 Ves. 673-681-682; *Geldard v. Randall*, 9 Jur. 1085; and see *Farmer v. Dean*, 32 Beav. 327; and *Lewin*, 389.

The sale being concluded, an affidavit of the auctioneer, of the publisher of the newspaper, and of the bill-poster, is brought into the Master's office and filed. It may here be remarked that, by the English practice, the newspapers themselves are filed, and that was the practice here; but it was found in many cases that where the publication was made at a distance, the papers could not be obtained. As it would be inconvenient to annul sales simply because the publishers of newspapers had been negligent in forwarding the copies of the papers, the practice arose of receiving an affidavit of the publication, referring to a slip cut out of the paper containing the advertisement. On filing these papers a warrant is taken out by the party conducting the reference, which he underwrites thus, "*To settle report on sale.*" This is served on all the parties who were entitled to service of the warrant to settle the advertisement; but the purchaser is not to be served. On the return of this warrant, the Master, on being satisfied by the affidavits filed, that his directions as to the sale have been complied with, makes out his report on the sale. Order 387 provides that "*The report on sale is to be in the form set forth in Schedule Q., or as near thereto as circumstances permit.*" This is filed in Toronto, and becomes absolute, without any order confirming it, at the expiration of fourteen days after filing, unless previously appealed from. Where property has been put up for sale under an order of the Court, but the sale has proved abortive for want of bidders, the property may be advertised and put up for sale again without further order.¹

Where a sale has proved abortive by reason of the purchaser refusing to complete the contract, a re-sale will be granted *ex parte*; but if any relief is asked against such defaulting purchaser, notice must be served on him.²

In such a case the Master, in preparing the report on the sale, should state the same facts as to the publication as he would in case of a sale, and should then follow the form of report given in Schedule Q.

¹ *Sherwood v. Campbell*, 1 Cham. Rep. 269.

² *Martin v. Purdy*, 1 Cham. Rep. 263.

It is presumed that if, upon the warrant to settle the report on sale, it should be offered to be shewn to the Master that there had been improprieties committed, such as collusion between the party conducting the sale and a purchaser, by which the property was sold for less than it would otherwise have produced, the Master has authority to enquire into this, and may receive evidence on the point; and if he finds any improper conduct established, it will be his duty to refuse to confirm the sale. In such a case the sale becomes simply abortive, and a new advertisement may be settled, and another sale had without any further order of Court.

But, his finding may be appealed from. The following case was brought before the Court on an appeal from a Master's certificate: One of the testator's sons bid at a chancery sale of his father's property; such bidding being by those present supposed to be for himself, but being in reality for another person, who had secretly employed the son to bid under the expectation that there would be less competition against the son than against a stranger, and the property was knocked down to the son, but the contract thereupon was signed by his principal; and it appeared that the effect of the son's bidding, being supposed to be for himself, had been to deter others from bidding; the Court, holding this to be a surprise on other bidders, and an unjust advantage to the purchaser, refused to enforce the purchase, and directed a re-sale at the risk and cost of the purchaser.¹

Semble, that a purchaser at a sale under decree has a right to take out the report on sale, and get it confirmed, so as to obtain a completion of the purchase to himself, at least where he is the sole purchaser.²

Besides the remedy, however, which a party injured by an improper sale has before the Master on the warrant to settle the report on sale, the sale may be set aside by the Court. Order 388 provides that "A sale must be objected to by motion to the Court to set aside the same, and notice of the motion must be served upon the purchaser, and on the other parties to the cause; but the bid-dings are only to be opened on special grounds, whether the appli

¹ *Rodgers v. Rodgers*, 13 Grant, 143.

² *Crooks v. Glenn*, 1 Cham. Rep. 364.

cation is made before or after the report stands confirmed." The "highest bidder" at an auction sale is the "purchaser," under the General Orders of the Court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position. The omission in an advertisement of sale, to state that the premises are leased advantageously, will afford good ground for staying the sale, but an application for such purpose should be made promptly, and before sale. Where the plaintiff, who had the conduct of the sale, assigned his interest, and an order to revive, making the assignee a party, was, a few days before the sale, taken out, but not served, and an order taken to substitute for the plaintiff's solicitor the solicitor of the assignee, and the case went on under the control of such new solicitor, the Court set aside the sale, although reluctantly, as great delay had been shown on the part of the mortgagor in making the application, and he was, under the circumstances, ordered to pay the costs incurred by the new sale.¹

In ordinary sales by auction or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; in such cases, the purchaser is not considered as entitled to the benefit of his contract till the Master's report on the sale is absolutely confirmed.²

Where estates are sold under its decree or order, the Court considers itself to have greater power over the contract than it would have were the contract made between party and party;³ and as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of "opening the biddings": that is, of allowing a person to offer a larger price than the estate was originally sold for, and upon such offer being made, and a proportionate deposit paid in, of directing a resale of the property.⁴ The Court, however, has a discretion: which it exercises subject to the particular circumstances of the case;⁵ and will refuse the application, if it is frivolous or vexatious.⁶

¹ *McAlpine v. Young*, 2 Cham. Rep. 171.

² 1 *Sugden v. P.* 58.

³ See *Savile v. Savile*, 1 P. Wms. 745-747; *Barlow v. Osborne*, 6 H. L. Ca. 556; 4 Jur. N. S. 367; S. C. *nom. Osborne v. Foreman*, 8 De G. M. & G. 122; 2 Jur. N. S. 381; *Harper v. Hayes*, 7 Jur. N. S. 245; 9 W. R. 504, L. C.

⁴ The expediency of this practice seems very doubtful: see remarks of Lord Eldon, in T. & R. 75, Jac. 526; and 2 J. & W. 348; and of the learned lords in *Barlow v. Osborne*, *ubi sup.*

⁵ *Ryder v. Earl Gower*, 6 Bro. P. C. 306.

⁶ *Baillie v. Chaigneau*, 6 Bro. P. C. 313.

Any person may open the biddings; and there seems to be no doubt that a person who is interested in the produce of the estate such as a residuary legatee,¹ or a tenant for life, or reversioner, may do so,² but the opinion of the Court appears to have fluctuated upon the question, whether the Court will entertain an application to open the biddings on behalf of a party who was present at the sale. Thus, in *M'Culloch v. Cotbach*,³ Sir John Leach, V. C., refused such an application; but, in *Thornhill v. Thornhill*,⁴ Lord Eldon said, that, although the circumstance that the person proposing to open the biddings had been present at the sale might be an objection, yet many cases might be put, in which it would be impossible to act upon it as a general rule, and that each case must be governed by its own circumstances; and, in *Tyndale v. Warre*,⁵ the same learned Judge said, that although the Court looks with jealousy at the circumstance of the person applying having attended the sale, the way in which that jealousy had been exercised was by expecting a larger offer to be made, under the idea of having a compensation by the largeness of the offer for any loss that may have arisen from the want of competition at the sale. In that case, his Lordship permitted the biddings to be opened on an advance of 600*l.* offered upon 3,800*l.*; and the same principle was afterwards acted upon, in *Lefroy v. Lefroy*,⁶ by Lord Lyndhurst: who refused to open biddings, on behalf of a person who was present at the sale, upon an advance of 800*l.* upon 12,010*l.*, but ordered it to be done if 500*l.* were offered and deposited.

The rule of the Court is that a purchaser at sale under a decree is not bound by any irregularity in the proceedings, so as to cause him to lose the benefit of his purchase; where, therefore, the Master in settling the conditions of sale, had given permission, contrary to the General Orders of the Court, to all parties to the cause, including the plaintiff who had the conduct of the sale, to bid; and in his report erroneously stated that the sale had been duly advertised in two newspapers for four weeks next preceding the sale, when in reality it had been published in one of the papers for two

¹ *Hooper v. Goodwin*, G. Coop. 85; *Chapman v. Fowler*, 3 Hare, 577.

² *Williams v. Attenborough*, T. & R. 70-76.

³ 3 Mad. 314; see, also, *Sommer v. Charlton*, cited 5 Ves. 655, *Preston v. Barker*, 16 Ves. 140.

⁴ 2 J. & W. 347. 5 Jac. 525.

⁵ 2 Russ. 606; see, also, *Cochrane v. Cochrane*, 2 R. & M. 684; *Shallcross v. Hibberson*, 1 C. P. Coop. t. Cott. 380; *Re Jones*, 1 Giff. 284; 5 Jur. N. S. 1243; *Ware v. Watson*, 7 De G. M. & G. 739, 2 Jur. N. S. 1:9.

weeks, and in the other for three weeks only ; but the practice under General Orders of 22nd February, 1862, being that the party having the conduct of the sale, and not the purchaser, takes and files the report of the Master, and there being no allegation of the purchasers having been aware of the irregular proceedings, or any ground for imputing bad faith to them in the transaction, the Court refused an application made on behalf of the debtor to set aside these sales on account of such irregularities, and ordered the debtor to pay to all parties, including the purchasers, the costs of the application.¹ Where an irregularity had occurred in advertising a sale, but no injury had thereby accrued, and a fair price had been obtained, the Court confirmed the sale.² The Secretary, in Chambers, will not entertain a motion to confirm a sale where an irregularity has occurred, unless the sale has been approved of by the Master.³ An auctioneer acting under an order for sale, or Master, or other officer conducting such proceedings, is not bound by an order staying the sale, of which he has not notice. Where an order staying a sale for three weeks was granted on the day the sale was to take place, and the Registrar telegraphed to the Master conducting the sale that such order was granted, and the message reached him after the sale, but before payment of the purchase money ; an order made by a Judge in Chambers, refusing an application to set aside the sale was sustained by the full Court on rehearing.⁴ An order to open biddings will not be made after great delay against an innocent purchaser, unless misconduct is shown on the part of the purchaser.⁵ Biddings will not be opened, and a sale set aside on the ground that a party, (the defendant), was prevented from bidding by promises made to him by the purchaser ; such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit.⁶

One lot of land out of several, sold under order of Court, was purchased for £79 5s. ; after the sale another person came into the office of the plaintiff's solicitor, and offered £100. An application by the plaintiff, made under the circumstances, to substitute the latter person for the purchaser, was refused with costs.⁷

¹ *Dickey v. Heron*, 1 Cham. Rep. 149.

² *Cayley v. Colbert*, 2 Cham. Rep. 455.

⁴ *The Freehold Permanent Building Society v. Choate*, 3 Cham. Rep. 440.

⁵ *Crooks v. Crooks*, 2 Cham. Rep. 29.

⁶ *Brook v. Sawt*, 2 Cham. Rep. 145.

³ *Thomas v. McCrae*, 2 Cham. Rep. 458.

⁷ *McRoberts v. Durie*, 1 Cham. Rep. 211

A solicitor having the conduct of a sale, cannot withdraw the property offered after a bid has been made; his course would appear to be to move to open the biddings, if he has grounds for such a motion.¹ An order to open biddings will not be made after great delay against an innocent purchaser, unless misconduct is shown on the part of the purchaser.²

But the Court will, in a proper case, and upon conditions substitute a proposed purchaser at an increased price, for a party who has purchased property at a sale, under a decree of the Court, instead of opening the biddings generally, and directing a re-sale, giving the present purchaser the option to take at the increased price.³ Biddings will not be opened, and a sale set aside on the grounds that a party, (the defendant), was prevented from bidding by promises made to him by the purchaser; such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit.⁴

Mere advance of price, if the report on sale has not become absolute, is sufficient to open the biddings; and they may be opened more than once.⁵

The biddings may be opened where the sale has been made by sealed tender;⁶ but the rule under which the Court permits a stranger to intervene, for the purpose of opening the biddings, has no application to a sale by private contract. If, however, any of the parties adduce evidence showing that there has been some error or miscarriage in the proceedings, or that the price is grossly inadequate, the Court will refuse to confirm the contract.⁷

Where a defendant, who had obtained an order to open biddings, but was outbid at the second sale, applied to open the biddings again, on an advance of 160*l.* upon 1,335*l.*, Lord Eldon, as it appeared that notice of the motion had been given to the purchaser,

¹ *Madalpine v. Young*, 2 Cham. Rep. 85.

² *Crooks v. Crooks*, 2 Cham. Rep. 29.

³ *Harrison v. Patterson*, 1 Cham. Rep. 363; see form of Order to be made in such a case, in a note to this case, page 364 of 1 Cham. Rep.

⁴ *Brock v. Saul*, 2 Cham. Rep. 145.

⁵ *Sugd. V. & P.* 115; *Scott v. Newbitt*, 3 Bro. C. C. 475.

⁶ *Barlow v. Osborne*, 6 H. L. Ca. 556; 4 Jur. N. S. 387; S. C. *nom. Osborne v. Foreman*, 8 De G. M. & G. 122; 2 Jur. N. S. 361; *Waterhouse v. Wilkinson*, 1 H. & M. 636; *Sugd. V. & P.* 115. For the Order in *Osborne v. Foreman*, see *Seton*, 1207.

⁷ *Millican v. Vanderplank*, 11 Hare, 136; and see *Roberts v. Robinson*, cited *Seton*, 1203.

who did not appear, made the order, on the terms of the applicant paying all the costs.¹

An advance of 10*l.* per cent. was formerly considered to be sufficient to induce the Court to open the biddings;² but, in *Andrews v. Emerson*,³ Lord Eldon said, that the rule of 10*l.* per cent. was not a wise rule to establish, as the consequence was, that more was never got; and desired it to be observed that, in future, there should be no such rule. In *White v. Wilson*,⁴ his Lordship repeated the same opinion as to the impolicy of such a rule: but said, that in some cases he should be satisfied with an advance of 10*l.* per cent.; in others he should be satisfied with less; and in others, he should require more. And accordingly, in *Brooks v. Snaith*,⁵ it being a creditors' suit, his Lordship permitted the biddings to be opened upon an advance of 5*l.* per cent. on 10,000*l.* In *Garstone v. Edwards*,⁶ however, Sir John Leach, V. C., who appears to have been favourable to an adherence to the rule of 10*l.* per cent.⁷ refused an offer of 350*l.* on 5,800*l.*: observing, that where an advance so large as 500*l.* was offered, the Court would act upon it, though it was less than 10*l.* per cent. So that, on the whole, it may be concluded that, although in the case of an advance of so large a sum as 500*l.*, the Court will permit the biddings to be opened,⁸ even if it is under 10*l.* per cent., yet the Court, in ordinary cases, considers 10*l.* per cent. (which is the usual amount of the deposit paid upon sales by auction out of Court,) as a proper deposit to be paid when biddings are opened.⁹

Where the timber upon a lot sold has been taken at a valuation, the advance must be calculated upon the amount of the timber, as well as upon the price of the lot.¹⁰

¹ *Preston v. Barker*, 16 Ves. 140.

² *Anon.*, 3 Mad. 494. In the following cases, however, besides those noticed in the text, the Court has opened biddings upon a less advance: *Tait v. Lord Northwick*, 5 Ves. 655 (200*l.* on 2,300*l.*); *Anon.*, 5 Ves. 148 (200*l.* on 3,200*l.*); *Lefroy v. Lefroy*, 2 Russ. 606 (500*l.* on 12,010*l.*); *Cochrane v. Cochrane*, 2 R. & M. 684 (500*l.* on 13,500*l.*); *Lawrence v. Halliday*, 6 Sim. 296 (300*l.* on 5,030*l.*); *Domville v. Berrington*, 2 Y. & C. Ex. 728 (365*l.* on 7,300*l.*); *Barlow v. Osborne*, 6 H. L. Ca. 556; 4 Jur. N. S. 367; *S. C. nom. Osborne v. Foreman*, 3 De G. M. & G. 122; 2 Jur. N. S. 381; a sale by sealed tender (1,500*l.* on 36,500*l.*); *Re Jones*, 1 Giff. 284; 5 Jur. N. S. 1243 (200*l.* on 2,000*l.*). The Court has refused to open the biddings for 100*l.* on 3,200*l.* in *Anon.*, 5 Ves. 148; and for 300*l.* on 3,500*l.* in *Holroyd v. Wyatt*, 2 Coll. 537.

³ 7 Ves. 420.

⁴ 14 Ves. 151.

⁵ 3 V. & B. 144.

⁶ 1 S. & S. 20.

⁷ See *Anon.*, 3 Mad. 494.

⁸ *Lefroy v. Lefroy*, 2 Russ. 606.

⁹ See *Anon.*, 3 Mad. 494; *Bourn v. Bourn*, 13 Sim. 189; *Holroyd v. Wyatt*, 2 Coll. 537; *Terson v. Hawkins*, 13 Jur. 721, V. C. W.

¹⁰ *Bates v. Bonnor*, 6 Sim. 380.

Whatever the rate of the advance offered may be, the Court will not permit biddings to be opened unless it amounts to at least 40*l.*¹ Thus, where, upon a sale before the Master, two lots were sold, one for 656*l.*, and the other for 91*l.*, and a person applied to open the biddings, at an advance of 70*l.* on the first lot, and 80*l.* on the other, Sir John Leach, V. C., refused to make the order as to the second lot: the advance being under 40*l.*; but his Honour recommended the party moving to make another application, that the biddings for the two lots might be opened, and that a resale might take place in one lot, upon an advance of 100*l.* on the two lots; and this was afterwards done.² In a similar case, however, Sir Lancelot Shadwell, V. C., although he allowed the biddings to be opened upon an advance of 160*l.* upon 710*l.* for four lots, refused to direct them to be resold in one lot without some reason being assigned for it.³

In general, where biddings are sought to be opened of lots bought by different persons, a separate application, on a separate advance, as to each lot, must be made.⁴ As the biddings are merely opened for the benefit of the suitor, the Court will not, usually, favour any other person; therefore, where an application was made to open a bidding of 5,020*l.* on an advance of 150*l.* only, on the ground that the party had mistaken the time of sale, Lord Thurlow held the circumstance, that the bidder was too late, to be no ground at all, and said he would not open the bidding for a less advance than 500*l.*⁵

Where the biddings are opened, the purchaser is entirely discharged from his purchase; and if he has paid a deposit, or any part of the purchase money, into Court, he will be entitled to have it paid out to him. If he is the purchaser of more lots than one, and the biddings are ordered to be opened as to some of the lots which were first purchased by him, he will be allowed to have the biddings opened, and to be discharged from his purchase, as to all the lots which he has purchased: it being considered but reasonable, that if, having become the purchaser of a subsequent lot, in conse-

¹ *Farlow v. Weildon*, 4 *Mad.* 460; see *Leeland v. Grifith*, 2 *Moll.* 150.

² *Brookfield v. Bradley*, 1 *S. & S.* 23.

³ *Ward v. Cooke*, 9 *Sim.* 87.

⁴ *Goodall v. Pickford*, 6 *Sim.* 379.

⁵ *Anon.*, 1 *Ves. J.* 468.

quence of his being declared the best bidder upon the prior lot, he should, if he is deprived of the purchase of the first lot, have the option of retaining or retiring from the subsequent lots.¹ The purchaser, in order to entitle himself to such an indulgence, should appear upon the application to open the biddings, and show by affidavit that he bid for the subsequent lots in consequence of his having been declared the best bidder for the prior lots, the biddings for which are opened.²

Where an estate was put up in four lots, and, at the sale, A. purchased lot 1, and the other lots were bought in, and, afterwards, B. opened the biddings, and, on the resale, became the purchaser of lots 1, 2, and 3, whereupon A. applied to open the biddings of lots 1 and 2, the Court would not permit him to do so, unless he would agree to take lot 3, if B. should retire from it, at the price it had been sold for to B., in case it should not fetch the same price at the resale.³

The rules which regulate the practice of opening biddings upon the sale of a landed estate, do not apply when a colliery is the subject of sale. In *Williams v. Attenborough*,⁴ where the colliery had been sold in one lot for 8,850*l.*, Sir John Leach, V. C., directed the biddings to be opened upon an offer to give 10,000*l.*: but Lord Eldon discharged the order, on the ground that, in the event of anybody else bidding more at the second sale, and being declared the highest bidder, the purchaser would be discharged, and his deposit could never be made a security for a subsequent bidder; in the meantime, from the fluctuating nature of the property, a depreciation might take place; and then, if the highest bidder at the second sale should not prove to be a *bona fide* purchaser, a loss would be occasioned to the owners of the property. His Lordship said that, in *Wren v. Kirton*,⁵ the Court was disposed to open the biddings, if security was given to answer the difference between the produce of

1 *Price v. Price*, 1 S. & S. 386; see also *Fielder v. Fielder*, cited 1 S. & S. 386; *Boyer v. Blackwell*, 3 Anat. 656; *Ex parte Tinsley*, 4 Mad. 227, n.; 2 M. & K. 726.

2 See *Fielder v. Fielder*, cited 1 S. & S. 386.

3 *Bates v. Bonner*, 6 Sim. 380.

4 T. & R. 70-77.

5 8 Ves. 502. This case affords a remarkable illustration of the danger of opening biddings in the case of collieries. On the first sale, the colliery was sold for 23,000*l.* The Court opened the biddings, as it turned out, for a fictitious bidder. Afterwards, the biddings were again opened, and the lot put up for sale three times: on the two first occasions the sum bid fell to 12,000*l.* and 6,000*l.*; at the last sale, it was sold for 15,000*l.*; and there was an actual loss of the difference between 23,000*l.* and 15,000*l.*; see T. & R. 73-74.

the resale and of the original sale ; but that it was extremely difficult to manage the security, unless the whole money was paid into Court, to remain in Court as a pledge that the next purchaser should perform his contract. Where, however, a colliery had not been worked for ten years, the biddings were opened on the customary advance.¹

On a sale of property held on lives, the biddings were opened on an advance of 350*l.* on 5,500*l.* : the applicant consenting to be bound in case no better bidding could be enforced.²

The application to open the biddings should be made after the report on sale has been filed ;³ but before it has become confirmed.⁴ After it has become binding, increase of price alone, however large, is not sufficient to induce the Court to grant the application : although it is a strong auxiliary argument, when there are other grounds.⁵ But very particular circumstances may, perhaps, induce the Court to open the biddings, after the report on sale has become binding, if the advance is considerable. Thus, in a case,⁶ where the owner of the estate (who joined in a motion for the purpose of opening biddings, after the report was absolutely confirmed, was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able, and that he had even directed persons to bid more than what the estate sold for, who deceived him : an advance of 4,000*l.* (more than one-fourth of the original purchase money,) being offered, the biddings were opened, on a deposit of the 4,000*l.* being made. Strong as the circumstances in this case were, Lord Eldon, in a subsequent case, expressed great disapprobation of the decision, and determined, generally, that, after a purchaser had confirmed his report, unless some particular principle arose out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the

1 *Jeffreys v. Smith*, 1 C. P. Coop. t. Cott. 381.

2 *Walond v. Walond*, 8 Beav. 352.

3 *Lovegrove v. Cooper*, 9 Hare, 279.

4 *Bridger v. Penfold*, 1 K. & J. 28 ; *Ware v. Watson*, 7 De G. M. & G. 739 ; 2 Jur. N. S. 129 ; *Barlow v. Osborne*, 6 H. L. Ca. 556 ; 4 Jur. N. S. 387 ; S. C. nom. *Osborne v. Foreman*, 8 De G. M. & G. 122 ; 2 Jur. N. S. 361 ; *Sugd. V. & P.* 116.

5 *Ware v. Watson*, 7 De G. M. & G. 739 *Sugd. V. & P.* 116-117 ; and see, *contra*, *Chetham v. Grurgeon*, 5 Ves. 86 ; see also *Prideaux v. Prideaux*, 1 Bro. C. C. 237.

6 *Watson v. Birch*, 2 Ves. J. 61 ; 4 Bro. C. C. 172.

bidding ought not to be opened.¹ Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser; and said he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales.² And in a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors, than to relax further the binding nature of contracts under the Court: observing, that half the estates that were sold in the Court were thrown away, upon the speculation that there would be an opportunity of purchasing them afterwards, by opening the biddings.³

Fraud will, of course, be a sufficient ground for opening the biddings.⁴ Therefore, if a survey is made of an estate with some degree of collusion with the tenants, and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it;⁵ or if the purchaser of the estate is partner with the solicitor in the cause, and is in possession of some particular knowledge, to the benefit of which the other parties are entitled:⁶ in such cases, the Court will open the biddings, although the report has become binding; but the biddings will not be opened on the mere ground that the purchase was made by one of two intending purchasers who had agreed that one should buy, and share his bargain with the other.⁷

The application for an order to open the biddings may be made by motion, stating the advance offered.⁸ The notice of motion, must be served on the person certified to be the purchaser, and on the parties to the cause.⁹ Where, however, the purchaser died before report became binding, and his executors were served

¹ *Morice v. Bishop of Durham*, 11 Ves. 57.

² *Fergus v. Gore*, 1 Sch. & Lef. 350.

³ *White v. Wilson*, 14 Ves. 151-153.

⁴ See *Morice v. Bishop of Durham*, 11 Ves. 57; *Fergus v. Gore*, 1 Sch. & Lef. 350; *White v. Wilson*, 14 Ves. 151-153.

⁵ *Ryder v. Gower*, 6 Bro. P. C. Ed. Toml. 306; *S. C. Gower v. Gower*, 2 Eden, 348; *Watson v. Birch*, 3 Ves. J. 53; 4 Bro. C. C. 172.

⁶ *Price v. Mozon*, July 14, 1754, before Ld. Hardwicke, cited *Watson v. Birch*, 3 Ves. J. 54; *Ryder v. Gower*, 6 Bro. P. C. 306.

⁷ *Re Carew*, 26 Beav. 187; 4 Jur. N. S. 1220; Sugd. V. & P. 117, n. (1.); and see *Galton v. Emus*, 1 Coll. 243.

⁸ *Seton*, 1204.

⁹ *Seton*, 1204; and see *Sherwood v. Beveridge*, 3 De G. & S. 425, 432.

with notice of the motion, it was held that service on his heir was not necessary.¹ If the Court approves of the sum offered, the application will be granted, and a resale directed.

The order usually made directs the applicant to pay the purchaser's costs of the application, absolutely ; and that, upon the applicant paying to the purchaser his costs, charges, and expenses occasioned by his bidding for and being allowed the purchaser,² and also paying into Court, by a short time, the full amount of his advance,³ the property be resold ; and that if there is no bidding at the resale higher than the price offered by the applicant, on opening the biddings or at the resale, he is to be allowed the purchaser at that price ; but that if he is outbid, the highest bidder is to pay into Court a deposit on his bidding within eight days after the certificate of sale : in default whereof the applicant is to be allowed the purchaser, unless there is an intermediate bidder : in which case, the property is to be again put up to sale ; and the defaulting purchaser is to make good any deficiency, and pay the costs occasioned by his default.⁴

If the discharged purchaser has paid a deposit, provision may be made, by the order, for recouping him the amount out of the applicant's advance ;⁵ and it seems the purchaser is entitled to interest on his deposit.⁶ If, however, the deposit has been invested at his instance, he must take the stock in satisfaction of the amount laid out, whether the funds have fallen or risen since the investment.⁷

If the estate has been sold in several lots, and it is intended to have it resold in one lot, the applicant may be required to pay the original purchasers any charges and expenses they may have been put to, in having surveys made, before the biddings were opened.⁸ Where, however, an application was made to Lord Rosslyn, upon a motion to open biddings, for a direction to the Master to include,

¹ *Templer v. Sweet*, 8 Beav. 464.

² The discharged purchaser is not entitled to the costs of perusing the abstract of title, where it has been sent to him prematurely ; *Raymond v. Lakeman*, M. R., 15 April, 1865 ; but see *Watts v. Martin*, 4 Bro. C. C. Ed. Belt, 113.

³ *Lord Thurlow's case*, cited *Anon.*, 6 Ves. 513.

⁴ For form of order, see *Seton*, 1202.

⁵ *Seton*, 1207 ; *Raymond v. Lakeman*, V. C. K., for M. R. in Chambers, Sept. 1864.

⁶ *Banks v. Banks*, 15 Beav. 380.

⁷ *Supd. V.* & P. 119.

⁸ *Watts v. Martin*, 4 Bro. C. C. Ed. Belt, 113.

in the costs of the purchaser, the expense of a journey to see the estate, his Lordship refused to give any particular directions: saying, the Master would, under the general directions, make the allowance, according to the practice.¹ The costs of the parties to the cause, of an application to open biddings are made costs in the cause.

Where the amount of the advance was 7000*l.* on 27,000*l.*, the Court considered a deposit in Court of 3,400*l.* was sufficient.²

If the applicant fail to comply with the terms of the order, it will, on the application of the first purchaser, or any of the parties to the cause, be discharged with costs;³ and the Court will not grant the applicant further time to pay in his deposit, or make a second order to open the bidding at his instance.⁴ Where he fails to draw up the order, or to act upon it, the order cannot be treated as a nullity, without notice to him: any other person may, however, apply to open the biddings by motion or summons: of which notice must be given to the former applicant, as well as to the other parties.⁵

The proceedings upon the resale are usually the same as upon the original sale. If deemed expedient, the property may be allotted in a different manner.⁶

If the person at whose instance the biddings were opened is outbid at the resale, he is, upon the certificate of the resale becoming binding, and upon the highest purchaser paying his deposit into Court, discharged from his offer; and may, upon motion, obtain an order for the repayment of his deposit.⁷ If the purchaser at the resale fails to pay in his deposit, the person at whose instance the biddings were opened will be declared the purchaser at the amount at which he opened the biddings; or at his highest bidding beyond that amount at the resale, if there was no intermediate bidder.⁸

¹ *A non.*, 2 Ves. J. 286.

² *Manners v. Furze*, 17 L. J. Ch. 485, V. C. E.; and see *Banks v. Banks*, 16 Beav. 380.

³ *Banks v. Banks*, 16 Beav. 380, n.

⁴ *Seton*, 1206; *Colebrooke v. Clarke*, 9 L. J. Ch. 180, V. C. E.

⁵ *Gibbons v. Howell*, 4 Mad. 62.

⁶ *Watts v. Martin*, 4 Bro. C. C. 113; *Humphries v. Roberts*, 6 Jur. 680, V. C. K. B.; *Ward v. Cooks*,

9 Sim. 87; *Seton*, 1206.

⁷ *Seton*, 1206; *Williams v. Attenborough*, T. & R. 77.

⁸ See terms of order, *ante*, 1159.

Where the applicant is discharged, he is not in general entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding.¹ Where, however, the biddings have been opened for the express benefit of the family, or the persons interested in the estate, the applicant has been allowed his costs, and interest on his deposit.²

If the applicant is outbid, he may apply to reopen again, on notice to the second purchaser, and the parties to the cause, and on payment of all the costs.³

The deposit paid on opening biddings is considered as part of the purchase money paid: although, in the event of the depositor not being allowed the purchaser, it must be returned to him; and therefore, where the deposit was laid out, on the application of the vendor, in the public funds, which rose between the time of the deposit and the purchase being completed, the estate was held entitled to the benefit of the rise,⁴ and the depositor was held not to be entitled to the dividends on the investment, but was allowed 4l. per cent. interest on his deposit.⁵

Where a solicitor obtained leave to open biddings on behalf of one George Beauchamp, and, upon the resale, a person, who was declared the highest bidder, turned out to have been put forward by the same solicitor as a sham bidder, and did not complete his contract, Lord Hardwicke discharged the report of his being the best bidder; and it being admitted by the solicitor that there was no such person as George Beauchamp, his Lordship ordered the solicitor to stand as best bidder, at the price at which he had opened the biddings.⁶

Where an estate is sold by order of the Court, the sale is generally effected by public auction. The Court will, however, where it is for the interest of the parties, depart from its usual course and allow of the property being disposed of by private contract; and

1 *Rigby v. McNamara*, 6 Ves. 406; *Earl of Maclesfield v. Blake*, 8 Ves. 214; *Trefusis v. Clinton*, 1 V. & B. 361.

2 *Owen v. Foulks*, 9 Ves. 348; *West v. Vincent*, 12 Ves. 6; *Chapman v. Fowler*, 3 Hare, 577; *Filder v. Bellingham*, 1 Coll. 526; *Gravenor v. Miles*, 9 Jur. 838, V. C. K. B.; *Banks v. Banks*, 16 Beav. 380, n.

3 *Preston v. Barker*, 16 Ves. 140.

4 *Ambrose v. Ambrose*, 1 Cox. 194.

5 *Doyley v. Countess Powis*, 1 Cox, 206; 2 Bro. C. C. 32.

6 *Molesworth v. Opie*, 1 Dick. 289.

the Judge may receive proposals for sale by private contract before or after the property has been put up for sale by public auction.

Where it is proposed to sell the estate by private contract, the purchaser usually enters into a contract with the party conducting the sale, or some other party to the proceedings, or his agent, to buy the estate at the price and on the terms therein specified, subject to the same being approved by the Court or Judge in the suit, within a limited time; and where particulars and conditions of a sale of the property by public auction have been printed, a short contract, referring thereto for details, is usually indorsed on a copy of the particulars.¹

The contract having been entered into, a petition is presented, or motion made, usually by the solicitor conducting the sale, that this conditional contract may be carried into effect. The petition or notice of motion must be served on all the parties to the cause that are interested in the sale, and must be supported by evidence showing, either that a sale has been directed, or that the Court has power to sell, and by an affidavit that the terms of the proposed contract are proper to be accepted, and likely to be more advantageous to the parties than if the property were offered to public competition. The person contracting to purchase sometimes attends at the hearing of the motion, and admits his signature to the contract. Where he does not, it seems usual and proper to require such signature to be proved by affidavit. If the Court or Judge is satisfied that the contract ought to be adopted, it will be ordered to be carried into effect;² and where the Court is not satisfied, it sometimes directs an inquiry to be made at Chambers. Where the Court or Judge considers that any of the terms of the contract should be varied, and the purchaser appears and consents, the order may direct that the contract be varied accordingly, in the manner specified in the order, and as so varied be carried into effect; and

1 The object of this is, of course, to save the expense of repeating in the contract such matters applicable thereto as are contained in the particulars; but this is sometimes lost sight of, the parties agreeing to sell "on the terms of the within conditions of sale, or such of them as are applicable to a sale by private contract." Many essential terms are thus left in uncertainty. As to contracts by agents, see *Add. Cont.* 586-634; *Supd. V. & P.* 820; and for the sale of land, *Add. Cont.* 66-117; *Supd. V. & P.* 121-200; 1 *Prideaux* Conv. 43-52; and for forms of contracts of sale, see 1 *Prideaux*, 63, *et seq.*; 2 *Davidson* Conv. 3-14.

2 *Douie v. Lucy*, 4 *Hare*, 311; *Pinner v. Inceall*, 10 *Hare*, App. 74; and see *Bousfield v. Hodges*, 33 *Beav.* 90. For form of order confirming a contract, see *Seton*, 1189; and for an order to carry into effect several contracts specified in a schedule, with directions to pay in, by reference to the schedule, see *Smith v. Smith*, cited *Seton* 1189.

where he does not appear, the order sometimes directs that, upon the contract being varied in a particular way, it is to be carried into effect.¹

After the order directing a sale by private contract to be carried into effect has been made, the sale will not be opened because an increased price is offered.²

If the purchaser appears on the application to approve the contract, and accepts the title, the usual directions for the payment in of the purchase money, and the completion of the purchase, may be added to the order.³ Where a deposit is paid on entering into the contract, it is usually directed to be paid into Court within a limited time by the order confirming the purchase.

In other respects, the practice after the order confirming the sale has been made is the same as the procedure on a sale by auction, after the certificate of sale has become binding, except so far as it is varied by the contract.

Proceedings after the confirmation of the Report on Sale.

Our order 389 provides that "At any time after the confirmation of the sale, the purchaser may pay his purchase money and interest, if any, or the balance thereof, into Court, without further order, upon notice to the party having the conduct of the sale, and when he is entitled to be let into possession of the estate, he may, if possession is wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause possession to be delivered to him."

To enforce possession the purchaser should apply on notice of motion to a judge in chambers which must be served on the person in possession, for an order for delivery of possession within a limited time; and upon service of the order and of a demand of possession, and the person in possession being a party to the cause, the purchaser may proceed by writ of assistance. If a person, not

¹ See form in *Seton*, 1189, No. 2.

² *Milliken v. Vanderplank*, 11 Hare, 136.

³ *Seton*, 1189. For form of summons to confirm contract, and pay in purchase money.

a party to the suit, be in possession, the purchaser must proceed by ejectment. But a purchaser of real estate, at sale, under the decree of the court will not be ordered to pay the amount of his purchase money into court until the title has been accepted or approved of.¹

But in a subsequent case,² in which no reference is made to *Crooks v. Street*, it was held that, where a sale has taken place under a decree of the Court, and has been confirmed, an order will be made for the purchaser to pay the balance of his purchase money into Court, though no enquiry has been made as to the title. When a purchaser neglects to pay in his purchase money and no objection is made to the title, the Court will order him, within a limited time, to pay in the amount with interest, or, in default, direct a re-sale of the property, and that the purchaser pay costs of motion and deficiency, if any, on such re-sale.³

Where a purchaser, under a decree of the Court, makes default in completing the purchase, the Court, if it sees fit, will order the property to be re-sold, and the purchaser to make good any deficiency that may arise upon such re-sale; but if the purchaser becomes insolvent, and unable to complete the purchase, he will be discharged from it.⁴

The result of these cases seem to be that the Court will order payment of the purchase money into Court, unless it is distinctly objected and shewn that the title is *bona fide* in dispute, and that the delay in payment is owing to the neglect of the party conducting the sale in establishing a good title.

Where money is ordered to be paid into Court, a payment to the solicitor of the party entitled to it is not a good one, and therefore is no ground for dispensing with payment into Court.⁵

¹ *Crooks v. Street*, 1 Cham. Rep. 95.

² *Re Stewart v. Stewart*, 1 Cham. Rep. 243. In *Rigney v. Matthews*, cited in 1 Cham. Rep. 243, a similar order was made by Esten, V.C. The authorities cited were *Harding v. Harding*, 4 M. & C. 514; *Saunders v. Gray*, 4 M. & C. 514; *Tanner v. Radford*, 4 M. & C. 519; and *Gray v. Gray*, 1 Beav. 199.

³ *Crooks v. Crooks*, 4 Grant, 376; decided June, 1854.

⁴ *Re Heely*, 1 Cham. Rep. 54.

⁵ *Blackburn v. Sheriff*, 1 Cham. Rep. 208.

Proceedings on Abstracts of Title.

Order 390 provides that, "After a sale under an order is confirmed, the vendor is, forthwith upon demand, to deliver an abstract of title to the purchaser; and if the purchaser does not serve objections within seven days, he is to be deemed to have accepted the abstract as sufficient. If objections are served, the vendor is to answer them within fourteen days; and if the purchaser is still dissatisfied, and if the parties cannot otherwise agree, either party may obtain from the Master a warrant to consider the abstract." [Under the Orders of June, 1853, the Master was not at liberty to proceed upon the abstract without a special order referring the title to him. It seems, however, that this Order is now dispensed with, and the Master will, at the instance of either party, proceed to enquire into the title simply on his warrant. In order to proceed under this Order, the party desiring the enquiry brings into the Master's office and files the abstract and objections. Before considering the practice in the Master's office, it will be convenient here to point out the requisites of an abstract, and the proof required to verify it.

An abstract of title may be defined to be "a statement of the documents and evidences relating to certain particular premises, in which all that is necessary to enable counsel to form a correct judgment upon the validity of the title, is given at length, and all that is immaterial is retrenched." It is more usually prepared on a sale or mortgage of property, but not unfrequently on the settling or charging it. Its object is to show the actual state of the title of the premises to which it relates, and by what charges and incumbrances they are affected. Strictly, every judgment by which the property is bound should be mentioned in the abstract;¹ but equity considers it complete, if it appears that on certain acts done the legal and equitable estates will be in the purchaser.²

Formerly the title-deeds were delivered to the purchaser, and his solicitor prepared the abstract at his expense, and the abstract was compared with the title-deeds by the council before whom it was

¹ *Richards v. Barton*, 1 Esp. N. P. C. 208.

² See 8 Ven. 436; 1 Jac. & Walk. 421; 2 Sug. Vend. & P. 78, ed. 10.

laid.¹ But now the purchaser, it seems, has a right to call for an abstract at the vendor's expense; and he is not obliged to take the deeds themselves in lieu of an abstract, and may, if it be refused, enforce its delivery by a bill in equity.²

Very great care and attention, and considerable knowledge, are required to prepare a correct abstract of title. The immaterial parts of the deeds, wills, and other documents to be abstracted, should be slightly noticed; the material parts should be fully given, and often set out *verbatim*. The abstractor, to do this correctly, must not only have a great familiarity with the parts and language of legal documents, but must also know the principles by which they are framed and construed.

We shall now consider, in the first place, the proper form in which an abstract should be prepared; and then mention the particular rules for abstracting the instruments which it usually contains.

It will be found useful before commencing the abstract, to draw up a short account of all the documents to be abstracted, mentioning their dates, nature, and effect.

The abstract should be fairly written on the usual paper.³

A head or title is always given to the abstract, in which the situation of the property to which it relates, the name of the owner, and his estate or interest therein, should be shortly mentioned. The particular parcels to which the title relates are also sometimes mentioned. A copy of the agreement or condition of sale should accompany the abstract.

If the lands are of peculiar tenure, it should also be mentioned in the head of the abstract. It is also usual to mention any qualification with which the premises are sold.

The wills, deeds, acts of parliament, &c., should then be abstracted in the order of their dates; all the material parts being given at

1 2 *Sug. Vend. & P.* 57, ed. 10, citing *Temple v. Brown*, 6 Taunt. 60, but this fact does not appear from the case.

2 1 *Prest. Abs.* 34; 2 *Sug. Vend. & P.* 57.

3 *Sug. Vend. & P.* 58. Sir Edward Sugden says, that he frequently, when in practice, refused to peruse papers illegibly written.

length, and the unimportant parts being simply referred to. Sometimes, however, it will be proper to arrange the abstract differently. Thus, if it relate to different parcels of land, or different terms of years, which have been purchased or assigned at different times ; or where the property has become vested in several persons as tenants in common, co-parceners or joint tenants, who have severed the tenancy, and there is a different deduction of title to the different shares, in such cases it will be proper to arrange all the deeds, &c., relating to any one portion together, and to head that part of the abstract with, "*As to the farm called A.*" &c., or "*As to the third part or share of B.*" &c., and thus throughout the abstract. So where there is a first and second mortgage of the same lands, which have been transferred from time to time to different persons, it will be proper to depart from the strict chronological order of the deeds.

So, also, it frequently happens that different parts of the lands to be sold or mortgaged are held under different titles. In such cases there should either be separate abstracts of each part of the property, or all the deeds which relate to one part should be first abstracted, and then the deeds which relate to the other part should be given. By this means much confusion is prevented.

Where an abstract is prepared with a view to show the title to different properties which have been purchased by different persons, a statement of the particular lands which have been purchased by the person on whose behalf counsel is instructed to advise, should accompany the abstract, and the instruments which relate to them should receive some mark of distinction.¹

Besides abstracting all the documents of the title, all such facts as will elucidate the title, as deaths, marriages, births, descents, &c., should be stated in the abstract according to the time of their occurrence, and these facts must be verified by the proper legal evidence.²

Entries by disseisin, abatement, intrusion, &c., where they have existed, should also be stated.³

¹ See 1 *Prest. Abs.* 38.

² 1 *Prest. Abs.* 43.

³ 1 *Prest. Abs.* 48.

If the premises are of a different nature, as partly freehold and partly leasehold, there should be separate abstracts of each kind of property.

The abstract should commence at the period fixed by the established rule on the point. What this rule is we shall hereafter consider. The instances where it will be necessary to furnish a title of a remoter date, will also be more properly considered in a subsequent part of this work ; but except in these cases, it will not be advisable to go further back in the title.

A vendor may, upon a suit for a specific performance, be compelled on oath to bring into the Master's office *all* documents in his possession, or power relating to the title, and would not be entitled to withhold them from the purchaser if he required them ; yet clearly he is not bound to furnish an abstract commencing before the proper period, whether the purchase is completed in or out of Court.¹

It will be useful to mention, at the foot of the abstract, whether the vendor or mortgagor is married, and if so, whether the wife is dowable out of the lands to be sold or mortgaged.

Here may also be noticed any peculiarity in the situation of any of the parties to the transaction.

The legal and equitable titles should be deduced to the vendor or mortgagor, or his trustees, or it should be shown that he has the means of obtaining conveyances of them from the parties in whom they are respectively vested. The history of all terms of years should also be brought down to the time of delivering the abstract, and it should be shown whether they have been merged or in whom they are vested. The discharge and satisfaction of all incumbrances and charges must be clearly shown in the abstract, and must be verified by the proper evidence.

It should also be shown which of the title-deeds are in the possession of the vendor, or of which he possesses copies, and in what way he can enforce the production of the originals.

¹ 2 *Sug. Vend.* & P. 57.

Having made these general observations on the form of the abstract, we shall mention the principal rules for abstracting the usual contents of the abstract; and it will be convenient to consider, *first*, abstracts of title of freehold property; and *secondly*, abstracts of title of property not freehold; but many of the observations contained in the first section will necessarily be applicable to the preparing the abstracts treated of in the second section.

I.—*Abstracts of Title of Freehold Property.*

The contents of abstracts of title of freehold property are—1. Deeds; 2. Wills; and 3. Miscellaneous Documents.

1.—*As to abstracting Deeds.*

Date and Parties.—The date and parties, with their residences, must always be carefully and correctly abstracted. It is also usual to mention the nature of the deeds, as a lease and a release, bargain and sale, &c. The characters in which the parties act, are also frequently and properly stated, as heir, executor, &c. Any facts connected with the parties are also frequently mentioned, as "*Between A.B., since deceased, or A.B. who was the surviving child of,*" &c., when they are not given in a subsequent part of the abstract; but these statements should be put in brackets, to show they are not parts of the deed abstracted.¹

Where a name occurs for the first time in an abstract, the description and place of residence should be given, and the person may afterwards be simply referred to as the "said A. B."

Recitals.—Wherever the recitals are material, they should be given at length. Thus, where they mention facts, as deaths, failures of issue, births, marriages, descents, majorities, survivorships, probates of wills, and the courts in which they are proved; intestacies, administrations, &c.; or where they serve to strengthen the title, as when a deed is recited, creating a power which is exercised by a deed afterwards abstracted, the recitals should be given at length. So, also, where deeds not in the power of the vendor, and which carry the title back to a more remote period, are recited, the recitals should be given at length. And recitals of agreements for

¹ 1 *Prest. Abs.* 56.

purchases, marriages, &c., which are afterwards followed by purchase deeds, settlements, &c., should be fully abstracted, if the agreements themselves are not abstracted.¹

Where recitals merely refer to prior deeds which have been abstracted, it should be simply mentioned that these deeds are recited; and, for more ready reference, the page of the abstract should be mentioned where the deeds are abstracted, as, "reciting the before abstracted indentures of lease and release, dated, &c. (*Ante*, p...)."

The earlier part of a title sometimes depends on the recitals in other deeds; and when this is the case it will be better to take them out of the deeds in which they are inserted, and arrange them in their order at the commencement of the abstract, thus: "Jan. 1, 1870. *It appears by a recital in an Indenture of Release of the....day of.....afterwards abstracted, that,*" &c.²

The recital of the contract for purchase, mortgage, &c., on which the abstracted deed is founded, should be shortly stated, as in some cases it may be important. Recitals also of payments having been made, or of the amount of interest due, should always be abstracted.

Testatum.—This part of a deed frequently commences with mentioning the purpose for which the deed is executed, as "*for docking and barring all estates tail.*" This should be shortly abstracted.

Consideration.—If there be a simple payment of the consideration stated in the deed, or if the consideration be immaterial, the consideration clause should only be shortly stated; but where a trust or power requires that the money should be paid in a special manner, then that part of the deed which expresses the application must be fully given, in order to show that all the requisites of the trust, or circumstances of the power, have been observed, and in such cases, the language of the deed should be closely pursued.³

1 1 *Pres. Abs.* 55.

2 1 *Pres. Abs.* 26.

3 1 *Pres. Abs.* 70.

So, also, where the money is payable out of a particular fund, as trust monies, the payment of the consideration should be fully stated.

Where the operation of the deed depends on the existence of the proper consideration, as a bargain and sale, or covenant to stand seised, it must be particularly mentioned; and where there is a doubt whether an instrument can operate in a particular manner, all the considerations should be stated, in order that it may be seen whether it may not operate in some other manner.

Nominal considerations should always be shortly stated.

The clause of the receipt of the consideration should be shortly abstracted, unless it contain some special matter, or mentions any particular fund out of which the money was to be paid; so where it is necessary to show the due application of the money, the clause should be fully stated.

In ancient deeds, the consideration is necessarily presumed to have been duly paid; but in modern deeds, that is to say, deeds executed within the last twenty years, courts of equity require the purchaser to look to the receipt usually endorsed on the deed, as evidence of the payment of the consideration and not to the receipt contained in the body of the deed; and the want of the receipt by endorsement, or in a separate instrument, is, it is said, implied notice that the purchase money has not been paid, and raises a question of equitable lien in favor of the seller for his purchase-money, or so much thereof as does not appear to have been paid.¹

But in one case,² the receipt indorsed on the deed was treated in a court of common law as immaterial, where the statement in the body of the deed was ambiguous. Mr. Justice Holroyd observed, that not being under seal, it could not amount to an estoppel, but could only be evidence for the jury, capable of being rebutted by the other circumstances of the case. And this opinion has been also adopted in a subsequent case.³

¹ 1 *Prest. Aba.* 72.

² *Langton v. Corke*, 5 B. & A. 611; 1 Dow. & Ry. 211.

³ *Botrell v. Summers*, 2 Y. & Jer. 407; but see *McManus v. Little*, 3 Cham. Rep. 263

But when a deed contains a statement of the payment of the consideration money, it will estop the party at law from proving that the consideration money was never paid.¹

Granting Part.—The grantor's or grantee's names, and the words of grant should be fully abstracted; and if the grant is made at the request, with the consent, or by the direction of any person or persons, the clause should be fully given.

Where a power is exercised, the words of reference to the power should be stated, together with the circumstances of the mode of execution and attestation; and by the memorandum of attestation it should be shown that these requisites were actually and duly observed.²

If executed prior to the passing of the 29 Vic., ch. 28 (18th September, 1865), evidence is necessary that the author of the power was living at the time the deed was executed.

The evidence may be dispensed with in two cases: (1.) If the power of attorney is thirty years old, and possession of the property has gone according to the deed for that period, the presumption may be made, without further evidence, that the appointor was living when the deed was executed.³ (2.) If the power of attorney was executed after the 18th September, 1865, its terms should be considered with reference to the 23rd section of the Property and Trusts act,⁴ which enacts that in case a power of attorney "provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes, both at law and in equity, according to the tenor and effect thereof."

The power may also be well exercised notwithstanding the appointor's death, if the party had no notice of the death when the deed was executed and the transaction completed;⁵ but a purchaser

1 *Baker v. Devoey*, 1 B. & C. 704.

2 1 *Prest. Abs.* 74.

3 *Con. Con. Ev.* 37.

4 29 Vic. ch. 28.

5 29 Vic. ch. 28, sec. 24.

is not bound to accept a title depending upon a former owner's appearing to have had no notice of what would otherwise invalidate the title.¹

The granting words should always be fully abstracted.

The words of limitation annexed to the grant, as to the grantee, *his heirs and assigns*, or *his executors or administrators*, should also be fully given.

In short, as this clause is one of the most important in the deed, it should in general be given *verbatim*.

In a lease and release, the reference to the lease for a year should be given shortly; and if the lease is lost, at length, as it may then be evidence of the lease.²

Where there are several and distinct clauses of grant, they should be given in separate lines, as they will thus more readily attract the notice of the counsel advising on the abstract.

Parcels.—Where the parcels are short, they are sometimes given at length at the head of the abstract, and merely referred to in the subsequent instruments; but the more general plan is to give the parcels at length in abstracting the first deed, as they are there described; and in the subsequent deeds to notice any variation which has taken place in the names or other material parts of the description, or, when there is no variation, to give a simple reference to them.³

Where the parcels are long, and relate to extensive property, it is usual and advantageous to arrange the closes and farms, occupiers and tenants, parishes, &c., in alphabetical order.

Where there is any change in the description of the parcels, it should be mentioned; and when there is an ancient and modern description, both of them should be abstracted.

When the parcels are described by reference to some other deed, the description should be given *verbatim*.

¹ *Francis v. St. Germain*, 6 Grant, 636.

² See 1 *Prest. Abs.* 80.

³ 1 *Prest. Abs.* 81-83.

The sweeping clause should always be fully abstracted, as it may serve to help out an insufficient description of the parcels.

The first words of the *general words* should also be given for the same reason; and where the description of the parcels is in general terms, they should be fully given, as they may help out the general description.

Whenever it is doubtful whether particular lands passed by a deed, from its terms being general, or from the description having become obsolete, the relevancy of the former deed ought to be shewn by means of contemporaneous documents, as leases, assessments to the land-tax, poor-rates, &c., maps, steward's accounts, and the like, as by such means the identity of the parcels may often be proved.¹ An affidavit of their identity should also in such cases be insisted upon.

Exception.—If there is any exception made in the grant, it should be abstracted.

The clauses of, *And the reversion, &c., All the estate, &c., And all deeds, &c.*, should be shortly noticed, unless they contain any special matter, for if so, they should be given fully.

Habendum.—The habendum, or habendums, should be fully abstracted, with the name of the grantee or grantees, and the words of limitation of the estate; and the presumed effect of the deed should never be attempted to be given.

Reddendum.—This clause should be stated briefly, except when the rent is reserved in some particular manner, and a question may be raised on the validity of the reservation, or when the rent is the subject of the title to be considered, and the deed is abstracted for the purpose of showing the creation of the rent.

But in general, it is sufficient to show the quantum of rent and the times of payment, and that it is clear of land-tax and all other deductions.²

1 1 *Prest. Abs.* 90.

2 1 *Prest. Abs.* 101.

The declaration of Uses, and the person in whose favour it is made.—This part of the deed must be carefully abstracted, and the exact words should be given; and this is the more necessary when there is any special circumstance connected with the declaration.

In abstracting words of limitation, marking the duration of the estate, it is very common in practice to give their effect, instead of stating the terms of the deed, as "*to A. for life, remainder to B. in tail,*" &c. And where the effect of the deed is clear and indisputable, this is not objectionable; but wherever this may admit of a doubt, the precise words should be given.¹

Where the title depends upon the exercise of a power contained in a deed or will, it will not in general be necessary or proper to abstract the uses which were limited in default of appointment; but where the validity of the appointment has been questioned, or where there has been a confirmation by the persons who would have been entitled, if the power had not been exercised, then the ulterior uses, as far as they are relevant to the title, should be abstracted.²

In abstracting the usual limitation to trustees, to preserve contingent remainders, it should always be shewn in the abstract that the lands are merely limited to them and their heirs *during the life* of the prior tenant for life; as, if their estate is not qualified in this manner, a doubt arises whether the trustees do not take the legal estate, and whether all the subsequent limitations are not merely equitable. It has been said that this must depend upon the intention, both in deeds and wills.³ And it would seem that the estate which the trustees would take under such circumstances, would be governed by the intention of the testator, where the limitations are contained in a will. This proposition seems sufficiently borne out by the case cited by Mr. *Sanders*,⁴ although it is opposed by Lord Thurlow's opinion in *Boteler v. Allington*.⁵ But where limitations of this nature occur in a deed, it is submitted that the question of intention cannot be raised, but that the trustees must in all cases take an absolute fee in the legal estate. Thus, in *Venables v. Mor-*

1 1 *Prest. Abs.* 116.

2 See 1 *Prest. Abs.* 119.

3 1 *Sand. Us. & Tr.* 260.

4 *Doe d. Compere v. Hicks*, 7 T. R. 433.

5 1 B. C. C. 72.

ris,¹ lands were settled by deed and fine to the use of J. M. for life, with remainder to trustees and their heirs *during the life* of J. M. to preserve the contingent remainders, with remainder to H. M. for life, with remainder to trustees *and their heirs* to preserve contingent remainders, with remainder to the first and other sons of J. M. and H. M. successively in tail, with remainder to the appointees by deed or will of H. M., and in default of appointment, to her right heirs; and it was *held*, that subject to H. M.'s life estate the trustees took the absolute legal fee simple. So also in a later case,² lands were limited in a settlement to the use of A. for life, and after his decease, to the use of B. and his heirs, during the life of A., to support contingent remainders; remainder to the use of C. for life; remainder to B. and his heirs, during the life of C., to support contingent remainders; remainder to the first and other sons of C. in tail male; remainder to the use of D. for life; and if she should marry, and her husband should survive her, to her husband for his life; and after the determination of these estates, to the said B. *and his heirs*, to support contingent remainders; remainder to the first and other sons of D. in tail; remainder to the use of E. for life; remainder to B. for life, *and his heirs*, to support contingent remainders; remainder over; and it was *held* that E. and the subsequent remainder-men took mere equitable estates, and that the legal fee remained in B.

Of course, where there are words in the deed which modify the limitations therein contained, they should be fully abstracted.

Where there is a long series of limitations, many of which have expired, if the deed containing them is an ancient deed, that is to say, more than forty years old, it seems unnecessary to abstract those limitations which can no longer take effect. They may, therefore, be simply referred to; but in all modern deeds, all the limitations, however numerous, should be fully given, in order that it may be seen that they have in fact determined.

Declaration of Trusts.—This part of the deed must in general be fully given; and when the trust is material to the title, it should always be shown that that which was directed to be done has been

¹ 7 T. R. 342, 438.

² *Colmore v. Tyndall*, 2 Y. & Jer. 605.

duly performed, or has failed of effect; and if it be incumbent on the purchaser to see that the money arising under the trusts has been duly applied, then the trusts which direct the application should be stated.¹

In abstracting the trusts, there should be shewn the act to be done, as to sell, &c., to exchange, &c.; by whom it is to be done; the term, if any, be pointed out, at or before which the trust is or is not to be performed; under what circumstances, when any circumstances are imposed as material; with whose consent or at whose request, if any such consent or request be made requisite; the mode by which any act is to be done, if any mode be pointed out, as by deed, auction, &c., the manner in which any act is to be done; as by deed, will, &c., if any mode be prescribed; the person or persons in whose favor the act is to be done; and when the nature of the trust requires it, the purchaser should see that all these requisites have been observed, and the documents which prove the observance of these requisites should be abstracted.²

Conditions and Provisoes, as conditions for defeating the estate granted; provisos for redemption and reconveyance, and for the cesser of terms, should always be abstracted. In abstracting a proviso for redemption, it should be shown by whom the money is to be paid, and to whom; the time of payment, and the rate of interest, should also be mentioned.

In abstracting provisos for cesser, the part of the proviso setting out on what circumstances the term was to cease, should be fully given.

Powers.—Powers which have been exercised, or which are to be exercised, in order to complete the title, should be abstracted *verbatim*. They should show the person or persons by whom the power is to be exercised, the mode of exercising the power, as by deed, will &c., and the circumstances which are to attend the execution, as the attestation, &c.; the time at which the power is to be exercised, if any time be prescribed; the consent or request which are essential to a valid execution of the power, and the mode

1 1 *Pres. Abs.* 134.

1 1 *Pres. Abs.* 134.

in which such consent or request is to be expressed ; the act authorized by the power, as to sell, exchange, &c., together with the circumstances connected with the mode of executing the power ; the person or persons in whose favor the power is to be exercised, as children, or a particular child, and the estate which may be appointed to them ; and whether the power is to be executed revocably or irrevocably.¹

Powers which are barred, released, extinguished, or become incapable of taking effect, or which are immaterial to the title, may merely be noticed in the abstract.²

When there is an indemnity to purchasers paying the money, and the power has been exercised, the clause which enables the trustees to give receipts for the purchase-money should be abstracted, and the clauses which contain directions for the application of the money, should be omitted.

If the deed contain a power to appoint new trustees, and the title is, or is to be, derived through or under the new trustees, and the acts done by these trustees, the power should be fully abstracted ; but where this is not the case, it is sufficient that it be shortly referred to.³

Covenants.—The covenants usually inserted in deeds need not be fully abstracted, they should merely be noticed. Thus the usual covenants for title, or ordinary covenants to produce deeds, need only be mentioned ; but if the covenants are qualified, it should be mentioned.

It will be proper, however, in examining the deeds, to pay particular attention to the exceptions, if any, in the covenants against incumbrances, and for quiet enjoyment ; if there are any such exceptions, they should be abstracted in the words of the covenant. Outstanding terms also, which are sometimes treated as incumbrances, and here noticed, should also be mentioned in the abstract. If there is no other information concerning a term, the abstract should adopt the words of the exception ; but if the term,

1 1 *Prest. Abs.* 151.

2 1 *Prest. Abs.* 151.

3 1 *Prest. Abs.* 152.

and all circumstances belonging to it, have been previously noticed, the reference to it may be short, except when the evidence of the title to the term appears different in the exception, from the state of the evidence in the former part of the abstract; in which case, the reference to the term should be fully abstracted.¹

So, when a covenant for the production of title deeds discloses any evidence of the title, not contained in a former part of the abstract, it becomes material, and should be noticed; and where there is a schedule of deeds, it should be stated, as a purchaser will have notice of any encumbrances effected by them.

In abstracting leases, all the burdensome covenants should be fully given; and wherever any special or unusual covenant occurs in a deed, it should be fully abstracted.

Execution.—It should always be mentioned in the abstract, by whom the deed has been executed; and if a particular mode of execution was necessary, as being an execution of a power or otherwise, it should be shown particularly how the deed was executed, in order that it may be seen whether it was properly executed. And wherever the precise date of the execution is important, it should be carefully mentioned in the abstract.

The execution and attestation of a deed poll is usually mentioned at the beginning of the abstract of it, as "By deed poll under the hand and seal of A. B. attested by two witnesses," and not at the end, as in an indenture.

A point of some practical importance may here be noticed. It is clear that signing was not essential to the validity of a deed at common law, sealing and delivering being alone sufficient.² But since the Statute of Frauds,³ it has been a matter of some discussion whether the signing is necessary to a deed.

On the one hand, Mr. Justice Blackstone considered that, since the Statute of Frauds, signature is as necessary to the perfection of all grants of lands and other deeds taking effect under its provisions, as

¹ 1 *Prest.* Abs. 153.

² See *Shep. Touch.* 60; *Perk* 53, ed. 1642.

³ 29 Car. II. ch. 3.

sealing.¹ On the other hand, Mr. Preston says, "that the Statute of Frauds is applicable only to mere agreements, not attended with the solemnities of a deed."² So Sir E. Sugden says, without any qualification, "signing is not essential to the validity of a deed, although sealing is."³ And it is to be remarked, that in the quotation by the same writer, of the first section of the Statute of Frauds, in the Treatise of the Law of Vendors,⁴ the important words, "*and signed*" by the parties creating the same, are omitted, although they are afterwards alluded to in a subsequent page. With these conflicting opinions, it will be proper shortly to consider the enactments of the Statute of Frauds on the point.

The first section enacts, "that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments created by livery of seisin only, or by parol, and not put in writing *and signed* by the parties creating the same, or their agents, thereunto lawfully authorized in writing, shall have the force and effect of leases or estates at will only, and shall not, either at law or equity, be taken to be of any greater force or effect, any consideration for making any such parol leases or estates, or former usages to the contrary notwithstanding." The second section makes an exception in favour of leases not exceeding three years, whereupon the reserved rent shall amount to two-thirds of the full improved value.

By section third, it is enacted, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, in, to, or out of lands or hereditaments, shall be assigned, granted, or surrendered, unless by deed or note in writing, *signed* by parties or their agents thereto authorized by writing, or by act and operation of law.

The fourth section enacts, that no action shall be brought whereby to charge any person upon any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action

1 2 Comm. 306-306, referring to 3 Leav. 1-2, and Stra. 764, neither of which references support his proposition.

2 3 Prest. Abs. 61; and see also 1 Prest. Abs. 154.

3 Powers, 242, 4th ed.

4 1 Vend. & P. 132.

shall be brought, or some memorandum or note thereof, shall be in writing *and signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

And section seventeen enacts, that no contract for the sale of goods for the price of ten pounds shall be good, unless a part of the goods is delivered, or something is given in earnest, or that some note or memorandum in writing of such bargain be made *and signed* by the parties or their agents.

By these sections it will be seen, "that all leases, estates, interests of freehold, or terms of years, or any uncertain interests" in lands, and that "all assignments, grants, and surrenders" of such leases, estates, or interests must be in writing, and are to be signed; and that all contracts for lands, or goods of ten pounds value, must also be signed, but that no other deeds than these are directed to be signed by this statute. The construction put upon the words of the first and fourth sections, by one of the eminent writers last referred to, is, that the terms of the first section are co-extensive with those of the fourth, and extend to every possible interest in lands which is not within the exception of the second section.¹ And this construction although not perhaps, according to the words of the act,² is consistent with its intent and objects. All that the Statute of Frauds therefore, has enacted, according to its most liberal construction, is, that all deeds, conveying, assigning, granting, and surrendering real property or real chattels, and agreements for their sale, and contracts for goods of a certain value, shall be in writing, and signed either by the parties conveying, &c., or their agents to be authorized in writing; but all other deeds are unaffected by this act.

A later case on the subject is *Taunton v. Pepler*,³ where it was determined that signature was not essential to a release by deed given to an administrator, and of course relating to personal property; which is in confirmation, as far as it extends, of the above remarks.

¹ *Sug. Vend.* 67, 7th ed.

² See *Crosby v. Wadsworth*, 6 East, 610.

³ 6 Madd. 166.

Another construction of the statute is, that deeds are left by it as at common law; and signature is still unnecessary to them; but that the signature mentioned in the act is merely requisite to the *notes in writing* referred to therein. This opinion, however, although adopted to some extent,¹ cannot, it is submitted, be correct.

Considering the doubt affecting the point, it should always be mentioned in the abstract what parties have signed the deeds.

Receipt.—Where money is to be paid under a deed, in all modern transactions a receipt is indorsed on the deed for it, and this receipt should therefore be mentioned in the abstract. It is the proper evidence that the money has been paid.² But this does not apply to nominal considerations, for a receipt for them is never indorsed, and is unnecessary,³ as they are, in fact, rarely paid.

A deed may be executed before payment of the purchase money, and the endorsed receipt is not supposed to be signed until the money is paid. In case, therefore, of deeds executed before the 18th September, 1865, if the consideration has not been paid, the absence of a recital of payment, or of an indorsed receipt is deemed constructive notice of the nonpayment to future purchasers;⁴ and the grantor may have a lien on the property for the amount due to him. But in regard to deeds executed since 18th September, 1865, and registered, unpaid purchase money is no lien.⁵

So, where part of the money secured by a mortgage, appears, by a receipt endorsed on the mortgage, to have been paid off, this part should be noticed in the abstract.⁶

When the deed requires any further ceremony to render it perfect, as enrolment, livery of seisin, a memorial &c., the performance thereof should be mentioned in the abstract.

So also if the deed, or any part thereof, has been erased, interlined, or cancelled, it should be noticed in the abstract.⁷

¹ *Dixon on Tit. Deeds*, 566.

² *Reventree v. Jacob*, 2 Taunt. 141; but see *Lanpon v. Cork*, 5 B. & A. 606; 1 Dow. & Ry. 211; 8 C. and ante, p. 1171.

³ 10 Co. 67 b.

⁴ *Lee on Abs.* 418, 471; *Baldwin v. Duingan*, 6 Grant, 506.

⁵ 29 Vic. ch. 24, s. 65; Ont. Stat. 31 Vic. c. 20, s. 68.

⁶ 1 *Prest. Abs.* 166.

⁷ 1 *Prest. Abs.* 167.

Where it is the case, it should be mentioned that the deed has been registered, and in what book and page the registry is to be found.

In short, any other fact which accompanies the execution of the deed, and which in any way affects its validity, should be stated in the abstract.

2. *As to Abstracting Wills.*

In abstracting wills, the date should be taken from the will, and not from the letters of probate. Any charge imposed for the payment of debts, legacies, annuities, &c., should be shown; and if the debts are scheduled or specified, they should be mentioned in the abstract; but when there is a trust for the payment of debts and legacies, and the debts are not specified or scheduled, and it does not appear that all the debts have been paid, there does not exist any reason for stating the legacies specially, since the purchaser is not under any obligation to see that they are paid.¹

The clause exempting a purchaser or mortgagee from seeing to the application of the purchase-money, if it is contained in the will, should always be mentioned in the abstract.

In other respects, the rules laid down for abstracting deeds apply equally to wills, but, in general, wills should be more fully given; and where they are informally drawn, they should properly be given *verbatim*.

At the foot of the will should be shown the time of the death of the testator, the court in which the will was proved, and by whom, and the time of the probate, and if registered, the fact of registration should be added.²

If there be a confirmation of the will by the heir at law, or any conveyance taken from him, or any proceeding had against him, to establish the will, or if there be any interest left undisposed of, which descends to the heir at law, it is material to state who was the heir at law of the testator at his death; and when the circum-

¹ *Smith v. Guyon*, 1 B. C. C. 186; *Humble v. Bill*, 1 Eq. Ca. Ab. 353, C. pl. 4; *Barker v. Duke of Devonshire*, 3 Meriv. 310.

² 1 *Prest. Ab.*, 182-185.

stances of the case require it, there should be a deduction of the title from heir to heir, or from heir to devisee, and in some cases from heir to executor ; as, for example, where the land is converted into money, *quoad* the heir, or where the heir takes a lapsed legacy, or part of a residue as lapsed or undisposed of, or the residue of trust monies by resulting trust.¹

Where any devisee under the will dies in the lifetime of the testator, the fact should be stated ; and where a will is partially or wholly revoked, the deed, will, or circumstances which are the causes of revocation, should be mentioned, and it is most correct to state deeds, wills, &c., in the order of their dates.²

It is also usual to state that the testator died without altering or revoking, or without altering or revoking his will as far as it related to the lands in question.

So also where a will is proved in the Court of Chancery *per testes*, the fact should either be noticed generally, or the decree of the court should be abstracted, when it is material to the title on some other account.³

In wills of real estate, executed before the stat. 1 Vict. c. 26, the execution in the presence of, and attestation by, three witnesses, should always be mentioned ; and in wills of personal estate, if they have been executed and attested, these facts should also be stated.

In wills executed after the statute, it should be stated that its provisions have been complied with.

Codicils which revoke, alter, or add to a will, should be given according to the order of their dates, and if they vary the state of the title, they should be stated as separate instruments.

When a codicil republishes a will, the date of the republication should be added ; and it is more proper to state it as a separate and independent fact, according to the order of its date, than by a memorandum at the foot of the will.⁴

1 1 *Prest. Abs.* 183.

2 1 *Prest. Abs.* 184.

3 1 *Prest. Abs.* 185.

4 1 *Prest. Abs.* 184.

When a person claims, as the executor of an executor, or the executor of a surviving executor, it should be shown that the will was proved by such first executor or surviving executor, and the representation should be carried on by shewing the probate of the will of the only executor or the surviving executor in each gradation of the succession. And when the executor or surviving executor dies intestate, there should be an abstract of letters of administration, *de bonis non*, of the first testator; and to make out a representation by an executorship to a surviving executor, the fact of his survivorship should be shown by certificates of burial of his co-executors before his death.¹

But, unless the title has been varied by intermediate acts, it does not seem necessary to show the letters of administration obtained by each successive administrator.²

Letters of probate are good evidence of the facts they state; but if the facts are mis-stated, or can be controverted, a purchaser might make such mistake a ground of objection the title.³

Letters of probate, or administration, do not form any essential part of a title to real estate, although it be derived under an authority to executors to sell.⁴

3. *As to Abstracting Miscellaneous Documents.*

Letters of Administration.—Wherever letters of administration are material to the title, they should be abstracted, whether general or special.

The abstract should show the date of the letters of administration, by whom they are obtained, out of what court, viz., a court of competent jurisdiction, and the subject of the administration.⁵

Private Acts of Parliament.—In abstracting private acts of parliament, the following parts should be given: 1. The time of the passing of the act, that is to say, the date of the royal assent. 2. The title of the act. 3. The recitals in the act, if they are in any way important. 4. The enacting clauses, which should be fully

1 1 *Prest. Abs.* 125; *Com. Dig. Admon. G. Off. Ex.* 146; *Touss.* 464.

2 1 *Prest. Abs.* 186.

3 1 *Prest. Abs.* 187.

4 *Doe v. Calvert*, 2 *Camp.* 399; *Comb.* 47; but see *St. Leger v. Adams*, 1 *Ld. Raym.* 731.

5 See 1 *Prest. Abs.* 188.

given, and the exception, or saving clause, if any. The more correct practice is to deliver a printed copy of the act with the abstract.

Judgments.—When judgments and *fi. fa.*s. against lands issued thereon affect the title, or are assigned and kept on foot to protect the title, they should be noticed in the abstract; and if they are assigned, the assignment and declaration of trusts should be added.¹

When they are known, or when there is not any outstanding estate by which the purchaser can be protected from them, by reason of his being a purchaser for a valuable consideration, and without notice, it is the duty of the vendor's solicitor to furnish the purchaser with an abstract of the judgments.²

Decrees.—Where decrees or decretal orders are material to the title, they should be abstracted, but only such parts should be given as affect the title.

If the decree directs a reference to the master, his report should also be abstracted, and its confirmation by the court should be stated.

Wherever money is paid into court, and it is incumbent to see that it has been so paid in, and there is no subsequent order which recognizes the payment, the fact of payment should be proved by an office copy of the accountant-general's certificate.³

It may sometimes be proper to state the substance of the bill and answer, and other proceedings in a cause, in the abstract, as well as the decree.

Whenever a decree is founded on a master's report, the report should be abstracted, and the order for confirming it.

If any proceedings in insolvency affect the title, whether on registration or not, they should, if known to the vendor, be shortly abstracted.

¹ 1 *Pres. Abs.* 190.

² See *Richards v. Barton*. 1 *Exp. N. P. C.* 290

³ 1 *Pres. Abs.* 190.

Contracts for Sale.—The contract for the sale or mortgage should either be fully abstracted, or, as is the more usual custom, a copy of it should accompany the abstract; and it will, of course, be the duty of the counsel before whom it is laid to see that the vendor shall make such a title to the lands as he has contracted to do.

II. ABSTRACTS OF TITLE OF PROPERTY NOT FREEHOLD.

1.—*Leaseholds.*—The abstract should commence with the deed creating the term, and the mesne assignments should then be given, together with the wills and other documents connected with the title.

If the original lease is made by virtue of a power contained in a prior deed, will, or act of parliament, such deed, &c., should be abstracted, so far as to shew that the power was well created and executed.¹

The registration should also be mentioned in the abstract.

2. *Personalty.*—In abstracts of title to personalty, the deeds, wills, and other documents, should be abstracted according to the rules before laid down with respect to freeholds, so far as the different natures of the property will admit.

Of the professional duties connected with Abstracts of Title.

Having considered the form of the abstract and its usual contents, it will now be proper to mention the professional duties connected with it; and this chapter may be properly divided into—I. The duty of the vendor's solicitor. II. The duty of the purchaser's solicitor: and III. The duty of counsel. And the rules which will be laid down will equally apply on a mortgage, or other charge of property, as on a sale.

I. *The duty of the Vendor's Solicitor.*

The vendor's solicitor must, at the vendor's expense, prepare the abstract of the title of the premises to be sold or charged, and do all necessary acts for completing the title.²

¹ See *Cooper v. Denne*, 1 Ves. J. 565.

² *Clowes v. Higginson*, 1 V. & B. 529.

He will often be able to produce a title much more remote than the requisite period, but it will be generally imprudent to do so, as it must increase the expense, and may give rise to useless and embarrassing enquiries.

The vendor's solicitor should suppress no fact or deed material to the title. Whenever he begins with the root of the title, he ought to abstract *every* subsequent deed, and if he were to suppress any by which the purchaser should be damnified, he would be answerable for the loss. But there is no pretence for a purchaser requiring, or a vendor's solicitor furnishing, an abstract of all the deeds in his possession however ancient.¹

Where there is a mere presumption of the satisfaction of the charge or incumbrance, the deeds should always be abstracted, because the presumption may be rebutted by contrary evidence, and then it will not avail.²

If a purchaser discovers any fact which has been concealed from him, and which affects the security of his title, and there has been a decided misrepresentation on the part of the vendor, although he has paid his money, and the premises have been conveyed to him, he will be entitled to have the conveyance set aside, and his purchase-money repaid with costs, although no interruption to his enjoyment has either been made or threatened.³

The Court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estate.⁴

If the property has remained a considerable time in one family, or is of great extent and importance, it will always be prudent, before a sale or mortgage, to submit an abstract of the title to counsel, on behalf of the vendor. By this means, the real difficulties and defects of the title may be known and remedied before it is brought into the market. Or if the defects cannot be remedied, they may be provided for by the articles of sale, which may restrict inquiries

¹ 2 *Jug. Vend.* & P. 58; *Richards v. Barton*, 1 *Esp. N. P. C.* 268; 1 *Pres. Aba.* 64.

² See *Barnell v. Harris*, 1 *Taunt.* 430.

³ *Edwards v. McLeary*, *Coop.* 308; 2 *Swanst.* 277; 8 *C. on appeal.*

⁴ *Pearl v. Bushell*, 2 *Sim.* 38.

beyond a certain date, or specify that the title is open to certain objections, and must be taken subject to them.

If the lands are sold by public auction, it seems doubtful whether articles of sale, providing that the purchaser shall take a defective title, would be held to be valid. Thus, in a late case from Scotland, where the vendor stipulated at a public auction, by the articles of sale, to deliver certain specified deeds, which were described as "all the deeds in his custody," such a provision was held to be void; Lord Lyndhurst, C., observing, that he never heard that because a vendor provides by the conditions of sale, that he will give to the purchaser only certain specified deeds, that the purchaser must take such title as appears upon the deeds.¹ But it is clear that the vendor may stipulate by private agreement that the purchaser shall accept the title such as it is;² and that a purchaser may waive his right to a good title by concluding an agreement after he has full notice that he is not to expect a title beyond a limited period. That may be matter of notice and not of contract.³ And even on a sale by public auction, stipulations of this nature will sometimes be allowed. Thus, where assignees put up to sale the bankrupt's interest in an estate, "as he lately held the same," an abstract of which might be seen at a particular office, and the auctioneer, on putting up the estate, explained to the bidders that it was a resale, on account of a defect of title, and that the assignees having rescinded the contract, again came before the public with such title as they had, and that the purchaser was not to expect a good title, but take it as it was, the Vice-Chancellor, (Sir John Leach) held that the vendee could not insist upon any other title than such as the bankrupt had, observing that a vendor, if he thought fit, might stipulate for the sale of an estate with such title only as he happens to have.⁴ And it may perhaps be laid down, that where notice of the articles of sale can be clearly brought home to the vendee, he will be compelled to accept the title, although the sale is by public auction. But conditions like that in *Freme v. Wright* should be looked at with great jealousy, as they are often traps for the unwary.⁵

¹ *Dick v. Donald*, 1 Bl. N. S. 661.

² *Wilmet v. Wilkinson*, 6 B. & C. 506, 9 D. & B. 620.

³ 3 Mer. 64; *Baxter v. Conolly*, 1 Jac. & Walk. 576.

⁴ *Freme and others v. Wright*, 4 Madd. 364.

⁵ 2 Sug. Vend. & P. 8; and see *Southby v. Hutt*, 2 Myl. & C. 207; *Wright v. Wilson*, 1 Moo. & Rob. 207; *Robinson v. Musgrove*, 2 Moo. & Rob. 92.

If a vendor, before conveyance to himself, sells by auction, and engages to make a good title by a certain day, which, not having obtained a conveyance, he cannot do, he is liable not only for the expenses incurred by his vendee, but also to damages incurred by the contract not being carried into effect.¹

The particular time at which the abstract should be delivered, is generally mentioned in the contract for sale, and the abstract should be punctually delivered at the appointed time; for, if the abstract is not then delivered, the purchaser may at law avoid his contract;² and it will also be avoided in equity, except in cases where the vendor has used all due diligence, but has been prevented by insuperable difficulties from fulfilling his contract;³ or perhaps where the purchaser has neglected to take the proper steps in calling for the abstract.⁴ But it is now settled that time may be made the essence of the contract as well in equity as at law.⁵ And in one case, Lord Eldon expressed his disapprobation of the principle, which allows a vendor to deliver the abstract behind the appointed period.⁶

If there be no time stipulated for the delivery of the abstract, it must be delivered as soon as it can be reasonably prepared.

Upon the delivery of the abstract, the vendor's solicitor must be prepared to produce the deeds themselves to the purchaser's solicitor, and if they are not in his possession, but can be obtained by virtue of a covenant or otherwise, they must be produced, and the expense of such production, including journeys if requisite, must be borne by the vendor.⁷ If the deeds themselves cannot be produced, the vendor's solicitor must furnish attested copies of them, for the purpose of being examined with the abstract.

Although a purchaser buys with full notice that a title cannot be made without the consent of a third person, yet it lies on the seller, and not on the purchaser to obtain the consent. It cannot be in-

1 *Hopkins v. Grazebrook*, 6 B. & C. 31. See *Walker v. Moore*, 10 B. & C. 416.

2 *Berry v. Young*, 2 Esp. N. P. C. 640, n.; *Wild v. Fort*, 4 Taunt. 334.

3 *Lloyd v. Collett*, 4 Ves. 689, n.; *Paine v. Meller*, 6 Ves. 349; *Radcliffe v. Warrington*, 12 Ves. 326.

4 See *Guest v. Hornfray*, 5 Ves. 823.

5 *Hudson v. Bartram*, 3 Madd. 440; and see *Boehm v. Wood*, 1 Jac. & Walk. 419; *Withy v. Cottle*, Turn. 78.

6 *Lechmere v. Brasier*, 2 Jac. & Walk. 289.

7 *Hughes v. Wynne* 8 Sim. 85.

ferred that the seller only agreed to part with his interest in the estate, so far only as he was able to do so.¹

II. *The duty of the purchaser's solicitor.*

Where a time is appointed for the delivery of the abstract, the purchaser's solicitor should take care to demand its delivery on or about that time, as he may otherwise be unable to enforce a specific performance of the contract.² If he wishes to rescind the contract, on the non-delivery of the abstract at the stipulated time, he should give notice to that effect to the vendor, and demand repayment of his deposit money; for if he allow the time to pass by without any step of this kind, he will be held to have waived his right to take advantage of the negligence on the other side.³ And if the abstract is delivered after the stipulated time, the purchaser's solicitor should only receive it, without prejudice to his client's right to take advantage of the neglect.⁴

The purchaser's solicitor must compare the abstract most carefully with the original instruments there abstracted, and must see that the abstract contains a full and correct statement of them. And if he finds them incorrectly abstracted, he should, by a rider, or by a correction of the abstract, supply a full and correct statement of them. The deeds are generally examined at the office of the vendor's solicitor; but wherever the deeds are, the purchaser's solicitor is bound to go to examine them; and, although it is a distant or inconvenient place, the vendor must pay the expense of the journey.⁵

The purchaser's solicitor can only be exempted from his duty of examining the deeds, by express contract with his client; but he is not bound to draw conclusions from the deeds; nay, if he does so, he does it at his peril, for he is bound to take the opinion of counsel on the deeds, and he is responsible to his client for giving a full and complete statement of the deeds or other documents on which he asks counsel's opinion.⁶

¹ *Lloyd v. Criepe*, 5 Taunt. 249; *Mason v. Corder*, 2 Marsh. 332; 7 Taunt. 9, 8. G.

² *See Guest v. Homfray*, 5 Ves. 518.

³ *Jones v. Price*, 3 Anst. 924; *Roper v. Coombes*, 6 B. & C. 534.

⁴ *Smith v. Bernam*, 2 Anst. 527; *Seton v. Slade*, 7 Ves. 265; and see *Lloyd v. Collett*, 4 B. C. C. 409; *Higwell v. Knight*, 1 Yo. & Col. 401.

⁵ *Sharp v. Page*, 2 Sug. Vend. & P. 82; *Hughes v. Wynne*, 8 Sim. 85.

⁶ *Ireson v. Pearman*, 3 B. & C. 700; 5 Dow. & Ry. 687.

It is the solicitor's duty also to see the whole of every instrument, and not to be content with an extract; and this rule applies particularly to wills. And he will be responsible to his client for any negligence in this particular.¹ But an action for the negligence of an attorney is barred by the Statute of Limitations, six years after *default*, and not after discovery.²

He should also see that the facts which support the title are properly and legally proved, and that they are supported by documents, which will be the best evidence of their truth in a court of justice.³

After these points have been attended to, the abstract should be laid before counsel; but it seems it is the duty of the solicitor to peruse it himself before sending it to counsel.⁴ And if the purchaser will not incur the expense of counsel, the solicitor should take a written memorandum from his client that such is the fact, and that it is against the solicitor's advice.

On receiving the abstract from the counsel to whom it has been submitted, it will be the duty of the solicitor for the purchaser to follow up all the enquiries, and to insist on all the requisitions made in the opinion on the title therein contained. This part of his duty must be most carefully attended to, as it is of the greatest importance. The abstract must then be re-submitted to counsel, in order that he may judge whether his requisitions have been correctly followed.

It is also the duty of the purchaser's solicitor to search for *fi. fa.* lands, recognizances, crown debts, &c., and all other defects in the title, and to satisfy himself that there are none (besides those disclosed to him) which affect the title; and the usual searches can hardly ever be dispensed with advantageously.⁵ And if a purchaser is damnified by his solicitor neglecting to search for incumbrances, it is clear that he may recover at law against the solicitor for any loss occasioned by his negligence.⁶

1 *Wilson v. Tucker*, 1 Dow. & Ry. N. P. C. 30; 3 Stark. 154, S. C.

2 *Howell v. Young*, 5 B. & C. 259.

3 See *Newall v. Smith*, 1 Jac. & Walk. 263.

4 *Draz v. Scroupe*, 2 B. & Ad. 581, 1 Dowl. P. C. 60.

5 See as to this, *Forshall v. Coles*, 7 Vin. Abr. 64, pl. 6.

6 *Brooks v. Day*, 2 Dick. 572; *Ireson v. Pearman*, 3 B. & C. 790; 5 Dow. & Ry. 657; 2 Sug. Vend. & P. 417.

Mortgages, Vendors' Liens.

If the purchaser is taking the land subject to any charges or liens which are not to be paid off out of the purchase money, enquiry should always be made of the persons appearing entitled thereto, as to their exact nature and amount; care being taken to inform them of the pending contract for purchase; for without such intimation the enquiry will be unavailing as against the person claiming the charge of lien.¹

A mortgage, although on its face made to secure payment of a specific amount, may be proved by parol evidence to be for a running account, and intended as a continuing security.

In *McMaster v. Anderson*,² a mortgage having been given by Anderson to the plaintiff, for £125, payable at a certain time, the mortgagor afterwards sold the equity of redemption to Nigh, at the same time showing him a receipt in full for all indebtedness, signed by the plaintiff and dated subsequent to the mortgage. On a bill being filed for foreclosure after the mortgagor's death, Spragge, V. C. admitted parol evidence to show that the mortgage, although given for a specific sum, was in fact intended as a continuing security for the mortgagor's indebtedness from time to time, not exceeding £125, and said, "I think that Nigh can stand in no better position than Anderson. It was his duty to have inquired of the mortgagee."

The lien which a vendor had prior to the recent Registry Act, for unpaid purchase money, bound the land for twenty years, though only six years arrears of interest could be recovered.

A purchaser without notice of the lien, who has got the legal estate, and registered his deed, can hold the land discharged from the lien; but if he had, before he paid his purchase money and obtained his conveyance, notice of the lien, the estate will be charged in his hands.

As a general rule, every suspicious circumstance which would put a cautious man upon his guard and suggest inquiry, will be deemed notice. If, therefore, there is anything suspicious about any of the deeds, as for example, if in the case of a deed executed before the 18th day of September, 1865, the endorsed receipt for

¹ Con. Con., Ev 6; *Moffat v. Bank of Upper Canada*, 5 Grant, 374.

² MS. 22nd May, 1865.

the purchase money is wanting, or is unsigned, proof of payment of the purchase money should always be called for; the absence of such a receipt being constructive notice to a purchaser that the purchase money is unpaid.¹

It is clear the lapse of even twenty years is not sufficient to raise the presumption of payment, because there may have been an acknowledgment of the debt; and if an acknowledgment should subsequently appear, a future purchaser will be bound by it.² After forty years, however, if possession has gone with the deed, payment may be presumed.

In the case of deeds executed since the 18th September, 1865, unpaid purchase money forms no lien on the land, the recent Registry Act providing that³ "no equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, after this act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns." But the act does not affect any liens created before the 18th of September, 1865.

In *McDonald v. McDonald*,⁴ it was contended that the act was retrospective, and that a lien existing before the act, was gone under the above section. In giving judgment, Mowat, V. C., said, "It is difficult to believe, and I do not believe, that the Legislature meant to legislate away existing 'liens, charges and interests.' The language used is certainly large enough to comprise equitable interests existing before the passing of the act, as well as those arising subsequently; but a like circumstance has been held in many cases to be by no means a decisive test of a meaning of a statute, words quite as broad as those in question have been construed as not retrospective. * * * I have examined most of the cases; and, reading the enactment in question in the light of these cases, and of the various clauses of the statute to which my attention was called, I am of opinion that the 66th section has not a retrospective operation."

¹ *Baldwin v. Duignan*, 6 Grant, 595; *Lee on Abs.* 418, 471.

² *Ball v. Ld. Riverdale*, Boat 550; *Stansfield v. Hobson*, 16 Beav. 236; 3 D. M. & G. 620; *Rodham v. Morley*, 1 D. & J. 1; *Pendleton v. Booth*, 1 Glff. 35; 1 D. F. & J. 81.

³ 29 Vic. c. 24, s. 66; Ont. Stat. 31 Vic. c. 20, s. 68.

⁴ 14 Grant, 133.

Crown Debts.

Before the 15th of August, 1866, securities and engagements to the Crown, bound the real estate of the debtors and also of their sureties, from the time when the security to the Crown was given, or when the office or engagement in respect of which the debt was contracted was acquired or entered into,¹ provided the requirements of the statute as to registration was complied with.

By the statute,² "no deed, bond, contract, or other instrument, under seal or of record, whereby any debt, or obligation or duty is incurred or created to Her Majesty, shall be valid or sufficient to charge or affect any lands or any interest in lands, of the person executing the same or affected thereby, as against any subsequent purchaser or mortgagee for valuable consideration of the same lands from such person, or against any subsequent registered judgment on the same lands against such person, unless a copy of such deed, bond, contract or other instrument, certified by the proper officer having the custody of the same had been registered in the office of the Clerk of the Court of Queen's Bench in Toronto, before the execution of the deed, conveyance or agreement of such subsequent purchaser or mortgagee, or the registry of such subsequent judgment."

The law has now, however, been altered, and in the case of bonds or other agreements entered into since the 15th August, 1866, "No³ bond, covenant, or other security, hereafter to be made or entered into by any person to Her Majesty, her heirs or successors, or to any person on behalf of or in trust for Her Majesty, her heirs or successors, shall bind the real or personal property of such person so making or entering into such bond, covenant or other security, to any further, other or greater extent than if such bond, covenant or other security had been made and entered into between subject and subject of Her Majesty."

"The⁴ real or personal property of any debtor to Her Majesty, her heirs or successors, or to any person in trust for or on behalf

¹ *Cons. Con. Ev* 234; *Lee on Abs.* 394.

² *Cons. Stat. U. C.* c. 6, s. 1.

³ 29 & 30 *Vic.* c. 43, s. 1.

⁴ 29 & 30 *Vic.* c. 43, s. 2.

of Her Majesty, her heirs or successors, for any debt hereafter contracted, shall be bound only to the same extent, and in the same manner as the real or personal property of any debtor where a debt is due from a subject of Her Majesty."

As the act applies only to bonds or covenants executed since its passing, it is unsafe to deal with any person who before that became liable on a Crown bond, until he has procured and produced his quietus, discharging him from all liability to the Crown,¹ or releasing the particular lands in question from the operation of the bond.

The statute² provides, that "The Governor in Council may order that all or any lands bound by such deed, bond, contract or other instrument, shall be released from the charge created thereby, and upon the production of such order certified by the President or Clerk of the Executive Council the Clerk of the Court of Queen's Bench shall enter and register the same in the said book as a release of the lands mentioned in the order, whereupon the lands shall be released accordingly."

By an act of the Legislature of Ontario, passed during the session of 1873, it is provided that "From and after the first day of January next, any lands bound by the registration in the office of the clerk of the Court of Queen's Bench in Toronto, of any deed, bond, contract or other instrument whereby any debt, obligation or duty is incurred or created to Her Majesty, in respect of any matter within the jurisdiction of the Government of Ontario, shall be released from the charge created by such registration, so far as the same is within the authority of the Government of Ontario." This, however, is not to affect obligations, or release any charge, which may, previous to the first of January, have been obtained against any such lands by virtue of any writ or other proceeding.

The search for Crown bonds should be made at the office of the Clerk of the Court of Queen's Bench at Toronto; but the Inspector under the Act for Quieting Titles³ has also an alphabetical list of all registered Crown bonds.

¹ *Conv. Con. Ev.* 226.

² *Con. Stat. U. C. s. 5, s. 3.*

³ 29 *Vic. c. 26.*

Executions.

Search must in every case be made in the office of the Sheriff of the County to ascertain whether there are in his hands any writs of execution against the lands of the vendor, and a certificate obtained that there are none.

To cover the contingency of writs returned by the Sheriff for renewal, the certificate should state not only that there is no execution in his hands at its date, but that there has been none for thirty days previous.

The certificate should also state that there has been no sale of the land under execution during the preceding six months. This is a sufficiently long period to carry back the search, because the statute¹ provides, that "all deeds of lands sold under process issued from any of the Courts of Law or Equity in Ontario, shall be registered within six months after the sale of such lands, otherwise the parties respectively claiming under any of such sales, shall not be deemed to have preserved their priority as against a purchaser in good faith who may have registered his deed prior to the registration of such deed from the Sheriff or other officer."

Before the passing of this act, no time was limited within which a Sheriff's deed required to be registered; and such a deed, though unregistered, could not be defeated by any subsequent conveyance made by the party whose lands had had been sold by the Sheriff."²

Now, however, purchasers are protected against the possibility of any unregistered deeds from Sheriffs being outstanding, as the same statute provides,³ that all deeds for lands sold "under process of law, before the passing of this act, shall be registered within one year after the passing of this act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who may have acquired priority of registration."

¹ 29 Vic. c. 24, s. 56; Ont. Stat. 31 Vic. c. 20, s. 58.

² *Burnham v. Dely*, 11 Q. B. U. C. 211.

³ 29 Vic. c. 24, s. 57; Ont. Stat. 31 Vic. c. 20, s. 59.

Taxes.

A certificate from the treasurer of the county as to arrears of taxes, or that there are none, should always be procured. The certificate should show on its face, that the statement of taxes in arrear for the preceding year has been returned to the county treasurer by the township treasurer.¹ If it does not show this, then a certificate must be procured from the township treasurer also, in which it should be stated that the collector's roll has been returned by that officer to the treasurer.² If the roll has not been returned, the collector's receipt for the taxes of the past year will be sufficient: but the county treasurer's certificate is required in every case, to show that there are no previous arrears.

A search must also be made to ascertain whether there has been any sale of the land for taxes during the preceding eighteen months. This period, over which the search must extend, is fixed, because the Registry Act³ provides that every deed made by a Sheriff or other officer, for arrears of taxes, must be registered within eighteen months after the sale, otherwise the parties respectively claiming under any such sale, shall not be deemed to have preserved their priority as against a purchaser in good faith who may have registered his deed prior to the registration of the deed from such Sheriff or other officer.

The Registry Act of 1865 contained⁴ an exactly similar provision; but until the passing of that act, there was no limit to the time within which such a deed required to be registered.

Purchasers are now, however, protected against the risk of any unregistered deeds on sales for taxes, executed before the 18th September, 1865, as the statute⁵ contains the following provision, "all deeds for lands sold for taxes, or under process of law, before the passing of this act, shall be registered within one year after the passing of this act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their

1 29 & 30 Vic. c. 53, s. 116.

2 29 & 30 Vic. c. 53, s. 104.

3 Ont. Stat. 31 Vic. c. 20, s. 58.

4 29 Vic. c. 24, s. 50.

5 29 Vic. c. 24, s. 57; Ont. Stat. 31 Vic. c. 20, s. 59.

priority as against a purchaser in good faith who may have acquired priority of registration."

Special Improvements.

Enquiry must also be made whether the property is liable to any special rate for local improvements, such a rate being made by statute, a charge upon the property benefited.

By the Consolidated Statute¹ of Upper Canada relating to Municipal Institutions, the Council of every city could pass by-laws² for assessing and levying upon the real property to be immediately benefited by the making, enlarging or prolonging of any sewer, or the opening, widening, prolonging or altering, macadamizing, grading, levelling, paving or planking of any street, lane or alley, public way or place, or of any side-walk therein, a special rate sufficient to include a sinking fund, for the repayment of debentures, which such councils were thereby authorized to issue in such cases respectively to provide funds for such improvements.

To the validity of such a by-law it was not essential, that it should be in accordance with the restrictions and provisions contained in the 223rd section of the act, which regulated the formalities necessary in by-laws for contracting debts by borrowing money or otherwise, or for levying rates for payment of such debts on the rateable property of the municipality.

To the validity of such a by-law it was, however, necessary,³ that it should name a day within the financial year in which it was passed when it was to take effect; the whole of the debt and the obligations to be issued therefor, were to be made payable in twenty years at furthest from the day on which the by-law took effect; also, that it should settle an equal special rate per annum in addition to all other rates to be levied in each year on the real property described therein, and rateable thereunder, for paying the debt and interest; and it was necessary that the special rate should be sufficient to discharge the debt and interest when payable, irrespective of any future increase in the value of the real

¹ C. 54.

² C. 54, s. 220, sub sec. 2.

³ C. 54, s. 201.

property, and also irrespective of any income from the temporary investment of the sinking fund or of any part thereof.

The by-law was also required to recite the amount of the debt created, and, in general terms, the object for which it was created, the total amount required to be raised annually by special rate for paying the debt and interest; the value of the whole of the real property rateable under the by-law as ascertained and finally determined; the annual special rate in the dollar, or per foot frontage, or otherwise, for paying the interest and creating the sinking fund; and that the debt was created on the security of the special rate settled by the by-law, and on that security only.

The Municipal Act of 1866¹ contains exactly similar provisions to those above mentioned; and by the act of the Legislature of Ontario amending the Municipal Institutions Act,² the above provisions are extended to towns also.

The rent which the Councils of cities, towns and incorporated villages are entitled to charge in respect of property drained into a common sewer, or which by any by-law is required to be drained into any such sewer,³ does not form a tax upon the land, but a personal charge upon the owner; the authority given by the statute being "for charging all persons who own or occupy property which is drained," &c.

In townships,⁴ on a petition of the majority in number of the resident owners of the property in any part of the township, for the draining of the property being presented, the municipal council could, under the Consolidated Statute, if of opinion that the draining of the locality described would greatly benefit the township, pass a by-law,⁵ providing for the draining of the locality; for assessing and collecting from the proprietors of the several lands immediately benefited by the draining, so much of the cost thereof, and of procuring the examination, plans and estimates to be made, and of all other expenses incident to the works, as may

1 29 & 30 Vic. c. 51, ss. 301, 302, 303.

2 Ont. Stat. 31 Vic. c. 30, s. 35.

3 Con. Stat. U. C. c. 54, s. 297, sub sec. 20; 29 & 30 Vic. c. 51, s. 206, sub sec. 56.

4 *Moore v. Hynes*, 22 Q. B. U. C. 107.

5 Con. Stat. U. C. c. 54, s. 278.

not exceed the benefit which the lands respectively derive from such draining, and in proportion, as nearly as may be, to the benefit of each of the proprietors therefrom.

The amount so to be assessed or collected would appear to form a charge upon the land, because the council are further empowered¹ to provide by the by-law "for ascertaining and determining, through the engineer, what real property will be immediately benefited by the draining, and the proportions in which the assessment should be made on the various portions of the lands so benefited."

By the Municipal Act of 1866,² the powers of township councils are extended to passing by-laws, for, among other things, "the deepening of any stream, creek or water course, or for draining of the property."

There is no doubt that under the provisions of the latter statute, the assessment for any of the above purposes will form a charge upon the property; the council being given the power³ to provide by the by-law, "for assessing and levying upon the real property to be immediately benefited by the deepening or draining, a special rate sufficient to include a sinking fund, for the repayment of debentures which such councils are hereby authorized to issue in such cases respectively, to provide funds for such improvements, and for so assessing and levying the same, by an annual rate in the dollar on the real property so benefited, in proportion, as nearly as may be, to the benefit derived by such portion."

The rate so assessed is to be levied "in the same manner as taxes are levied."⁴

The councils of cities, towns and incorporated villages may also pass by-laws⁵ for sweeping, watering, or lighting any street, square, alley or lane, by means of a special rate upon the rateable property therein.

¹ Con. Stat. U. C. ch. 54, sec. 279, sub sec. 4.

² 29 & 30 Vic. ch. 51, secs. 281, 282.

³ 29 & 30 Vic. ch. 51, sec. 282.

⁴ Ont. Stat. 31 Vic. ch. 30, sec. 30.

⁵ 29 & 30 Vic. ch. 51, sec. 240, sub. sec. 2.

The assessment under any by-law of the council of a town or incorporated village, for making or repairing any pavement in any public way or place near to any property, would appear, under the decision of the Court of Queen's Bench in *Moore v. Hynes*,¹ not to form a charge upon the property; the power given to the council in such a matter being, for assessing or collecting from the proprietors, &c., such sums as may be necessary.

County councils² may pass by-laws for levying by assessment on all the rateable property within any particular part of two townships, to be described by metes and bounds in the by-law, in addition to all other rates, a sum sufficient to defray the expenses of making, repairing or improving any road, bridge or other public work, lying between such parts of such two townships, and by which the inhabitants of such parts will be more especially benefited.

Mutual Insurance Companies.

It is important to ascertain, whether the vendor or any former owner has ever insured the buildings on the property, with any Mutual Insurance Company, because the property will, in such a case, be liable to the amount of the premium note given by the assured, and of the assessment thereon, for a proportionate part of any losses or expenses accruing to the company during the continuance of the policy.

The statute³ relating to Mutual Insurance Companies provides, that, "all the right and estate of the assured, at the time of insurance, to the buildings insured by the company, to the lands on which the same stand, and to all other lands thereto adjacent, mentioned and declared liable in the policy of assurance, shall stand pledged to the company, and the company may sell, demise or mortgage the same or any part thereof, to meet the liability of the assured, for his proportion of any losses or expenses accruing to the company during the continuance of his policy, which sale, demise or mortgage, shall be made in the manner specified in the policy of the assured."

¹ 22 Q. B. U. C. 107.

² Con. Stat. U. C. c. 54, s. 342, sub sec. 5; 29 & 30 Vic. c. 51, s. 344, sub sec. 6.

³ Con. Stat. U. C. c. 52, s. 67.

The inquiry as to such liens is an exceedingly important one, and should never be overlooked, because it is not necessary in order to preserve the lien of the company, that any instrument should be registered charging the lands mentioned in the policy.

In *Montgomery v. The Gore District Mutual Insurance Company*,¹ VanKoughnet, C., said, "I regret, contrary to my first impression, to have to come to the conclusion that such a policy of assurance, or such an assurance as is made the subject of consideration here, does not fall within the operation of the registry laws. In the first place, the legislature, in the act creating the lien, do not appear to contemplate that it should. They subject the right and estate of the assured in the land at the time of insurance to the claims of the company. Now, the insurance may be effected without the issuing of a policy. The policy is but evidence of the insurance. * * * But however this may be, suppose the policy made out, how are the company to register it? It is not pretended that they are to register anything else. The moment the policy is prepared, subject to the delivery of the note, and perhaps to the payment of the instalment by him, as provided for in the 22nd section of the act, it becomes the property of the assured. What right have the company to register it, and how can they register it? It is not a deed to them; it is a deed by them. It is the property of the assured from the moment it is ripe for delivery. But the chief difficulty lies in the machinery by which registration is to be effected. The registry laws require that the instrument of which the memorial is to be put on registry shall, for the purpose of procuring such registration, be produced to the Registrar, and that he shall thereon, immediately after the registration, indorse a certificate thereof. I do not see how the company, after the policy has become complete, and the property of the assured, can insist upon retaining it for the purpose of registration, and if they cannot do so, they are not blameable because it is not registered; and they cannot, therefore, be deprived of the lien which the law, without insisting upon registration, has given to them."

¹ 10 Grant, 504.

Dower.

If there is any deed in which the grantor's wife has not joined to bar her dower, or if the title is derived under a will or by inheritance, a claim for dower may exist.

In such a case, evidence that the grantor or testator was unmarried, should be called for, or if married, then proof of the widow's death, or that under the will she was put to an election between her dower and some other benefit, and that she has exercised her election by taking the substituted devise.¹

To consummate the right to dower, three things are requisite, viz.: marriage, seisin, and the death of the husband.²

It is not necessary, in order to establish a widow's right to dower, to prove the marriage by persons who were present at the ceremony;³ evidence of cohabitation and reputation of marriage is sufficient.⁴

It is necessary that the husband of the woman claiming dower must have had seisin of the lands and tenements out of which dower is claimed during the overture.⁵

Possession and receipt of rents has been held *prima facie* evidence of seisin; but in another case it was held that the demandment could not be allowed to recover on mere evidence of possession by her husband, without proving his title.⁶

By the Consolidated Statutes of Upper Canada⁷ relating to dower, "When a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained

1 As to election by a widow, see *Westacott v. Cockerline*, 13 Grant, 79; *Coleman v. Glensville*, 13 Grant, 42; *Fairweather v. Archibald*, 15 Grant, 255.

2 Co. on Litt. 31.

3 *Phipps v. Moore*, 5 Q. B. U. C. 16.

4 *Graham v. Law*, 6 C. P. U. C. 310.

5 *Parke on Dower*, 24.

6 *Draper on Dower*, 28.

7 Ch. 34, s. 2.

within the period during which such right of entry or action might be enforced."

Since 6th March, 1834, a widow is also entitled to dower out of equitable estates, the statute¹ providing, that, "When a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower out of the same at law, and such interest whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same."

It will be observed that while all that is necessary to entitle a woman to dower at law, out of lands where the husband had the legal estate, is that the husband should have been seised during the coverture, it is necessary to give her dower in an equitable interest, that the husband should die entitled thereto.

Dower may be barred, since the 11th day of May, 1839, by the wife joining in a deed or conveyance of the land containing a release of dower,² but before that date it was necessary to render a bar of dower effectual, that the wife should be examined apart from her husband as to her consent to be barred of her dower, and that a certificate of such examination should be endorsed upon the deed.³

It is still necessary where a woman bars her dower by a deed to which her husband is not a party, that she should be examined, and the fact of the examination certified on the deed.⁴

By an act passed in 1861,⁵ it is enacted that no action of dower can be brought, in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time, may not have been had, or though any informality may have occurred in respect thereof. A writer on the law of dower⁶ has expressed the opinion that by this

¹ 4 Wm. IV. ch. 1, sec. 13; Can. Stat. U. C. ch. 84, sec. 1.

² Can. Stat. U. C. ch. 84, s. 4; and see *Howard v. Scott*, 2 Chan. Cham. R. 274; *Hill v. Greenwood*, 2 O. B. U. C. 404. But see *Miller v. Wyllie*, 17 U. C. C. P. 268.

³ 27 Geo. III. ch. 7; 48 Geo. III. ch. 7; 50 Geo. III. ch. 10.

⁴ Can. Stat. U. C. ch. 84, secs. 6, 7, 8, 9.

⁵ 24 Vic. ch. 40, sec. 19; Ont. Stat. 32 Vic. ch. 7, sec. 23.

⁶ *Draper on Dower*, 44.

statute acknowledgments of bar of dower, as formerly required, appear to be abolished; but this view has not generally been adopted by the profession.

A sale of the land by the Sheriff under an execution against the husband, does not defeat the wife's right to dower;¹ but a sale and conveyance by the Sheriff for taxes does.²

Dower will be barred if not sued for within twenty years after the husband's death.³ And it cannot be recovered out of any separate and distinct lot, tract or parcel of land which at the time of the alienation by the husband, or at the time of his death, if he died seised, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purposes of cultivation, or occupation.⁴ This statute is retrospective.⁵

Curtesy.

Tenancy by the curtesy is like dower an estate for life, but differs from dower in being for the whole estate of the wife, not a third merely. It is also necessary to entitle the husband to be tenant by the curtesy, that there should be issue of the marriage, capable of inheriting, born alive during the lifetime of the mother.⁶

When the title depends on inheritance from a married woman who died before the 2nd of March, 1872, her husband may be entitled to an estate for life in the lands, and evidence of his death should be called for, or a release of his interest procured.

Tenancy by the curtesy has now been abolished by the Ont. Stat. 35 Vic., c. 16, s. 1. This act has been held by the Court of Common Pleas⁷ (C. J. Hagarty dissenting) to be retrospective, and to apply to women married before the passing of the act.

Legacies.

Legacies charged upon lands form a lien upon the property for twenty years from the time at which they become payable. Where,

¹ *Draper on Dower*, 45.

² *Tomlinson v. Hill*, 5 Grant, 231.

³ 24 Vic. c. 40, s. 18; Ont. Stat. 32 Vic. ch. 7, sec. 22.

⁴ Ont. Stat. 32 Vic. ch. 7, sec. 3.

⁵ *Re Tate*, 5 U. C. L. J. N. S. 260; Ont. Stat. 32 Vic. ch. 7, sec. 23.

⁶ Co. on Litt. 29 b.; *Bissett on Estates*, 40.

⁷ *Merrick v. Sherwood*, 22 C. P. U. C. 467.

therefore, the title is derived under a will charging legacies upon the land devised, proof of payment, or that they have been released must be called for.

The lapse of even twenty years is not sufficient to raise a presumption of payment, but after forty years, if possession has gone with the devise, payment may be presumed.¹

If the land is charged with the payment of an annuity, its discharge must be proved in the same way as the release of a legacy.²

The period within which an annuity may be presumed satisfied must depend on the life for which it is granted. If it is fair to presume, in the natural course of things, that the annuitant is dead, the want of a certificate of burial cannot be considered as an insuperable objection to the title, but no case has occurred in which such a presumption has been made in less than thirty years.³

He should also observe particularly that the wills, if any, have been duly signed and attested, that the deeds have been executed by the proper parties, that the execution by them has been duly attested, and that the receipt for the consideration money has been properly endorsed and signed.⁴

The case just cited is an important one on the subject of suspicious circumstances amounting to notice, and there it was held that, "whatever is notice enough to excite attention, and put the party on his guard, and call for enquiry, is also notice of everything to which it is afterwards found that such enquiry might have led, although all was unknown for want of the investigation."

In that case the Lord Chancellor said:—"The contents of the instrument itself were perhaps calculated to rouse suspicion, and prompt enquiry. But the back of the deed was checkered all over with suspicious appearances. The title of the deed, not in the engrossing hand, but written in a somewhat slovenly way, and with the words of the title of different sizes, beget a suspicion of

¹ *Cov. Con.* 1, 267; and see *Re Caverhill*, 8 U. C. L. J. N. S. 50.

² *Cov. Con.* 1, 264.

³ *Cov. Con.* 1, 264.

⁴ *Kennedy v. Green*, 3 Myl. & K. 609.

hurry and imperfection in the preparation of the instrument. When does a stationer ever send such a blank indenture out of his office, unless when pressed for singular despatch. Then the receipt written across one fold into a second square sideways, and the signature in the like manner running into the second square. But, above all, the receipt removed far from the top, and leaving such a space as might by the holder of the deed, supposing that space to have been left in blank, have been filled up in any manner he chose. This was at once a circumstance to excite the greatest, the most jealous suspicion, * * * every unusual circumstance is a ground of suspicion, and prescribes enquiry; and I hold the receipt written here in a way to enable any person to commit a gross fraud—a way for that reason never adopted—was abundant grounds for suspicion, and demanded inquiry and explanation. When to this we add the further unusual circumstance of the party's name being written on the square below, and with a fold between it and the receipt, so that it was most probably written when the receipt was folded down, assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry."

His attention should also be particularly directed to the parcel. The observations previously made on the proper parts of the instruments to be abstracted, will be a guide to the purchase's solicitor in this part of his duty.

He must also see that the deeds or wills have been duly registered and memorialized, where required.

In some instances, where the value of the property is small, or where the title has been recently investigated, the solicitor undertakes himself to advise on the abstract, without submitting it to counsel. But, as in case of any invalidity in the title, the solicitor would probably be held responsible to his client, this course can never be recommended, except with the precaution before mentioned.

Where this is reason to suspect that there is some information in the knowledge of the vendor, respecting the state of the title, which he has not disclosed in the abstract, as the purchaser is entitled to

a discovery from the vendor of all the information which he can communicate, this may be enforced by a bill in equity, or under the usual order of reference, that the parties shall be examined on interrogatories, and produce all deeds in their custody or power; and the purchaser's solicitor should enforce such right accordingly.¹ An affidavit before a Master in Chancery is sometimes effectual in cases of this nature, and elicits the requisite information.

Where any incumbrances are discovered, it will be proper to consider what indemnities should be taken against them, or whether it will be proper to avoid the contract altogether.

If the title turn out to be defective, the expenses of investigating the title, such as charges for searching for judgments, and for comparing the abstract with the title deeds, must be borne by the vendor;² but in order to recover them, there must be proof of a written contract binding on the vendor,³ and the expense of preparing the conveyance can hardly in any case be recovered, for it should not be prepared before the title is accepted.⁴

The purchaser's solicitor should call for and inspect the counterparts of all leases and agreements for leases mentioned in the abstract; and a similar precaution must be taken if the purchaser has notice of a tenancy in any other way; for notice either of a lease or of a tenancy will be held to be notice of the interest which the tenant has in the lands; and the purchaser will therefore be bound by the covenants and provisions contained in the lease.⁵ So, also, wherever there is an occupier, a purchaser will be bound to inquire into the nature of the occupier's title; and if he neglect to do so, he will have implied notice of the nature and extent of that title.⁶ But where the possession is vacant, a purchaser is not bound by constructive notice of the title of the late occupier. Thus, where under an agreement for an exchange between A. and B., each occu-

¹ *Presl. Abs.* 258.

² *Richards v. Barton*, 1 Esp. N. P. C. 267; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bratt v. Ellis*, and *Jones v. Dyke*, *Sug. Vend. & P. App.* vii. & viii.; *Walker v. Moore*, 10 B. & C. 416; *Jarmain v. Egelstone*, 5 C. & P. 172; *Hodges v. Litchfield*, 1 Bing. N. S. 492.

³ *Goebell v. Archer*, 2 Ad. & E. 500; 4 Nev. & M. 435.

⁴ *Hodges v. Litchfield*, 1 Bing. N. C. 492; 2 *Sug. Vend.* & P. 52.

⁵ *Richardson v. Sydenham*, 2 Vern. 447; *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Eyre v. Dolphin*, 1 Ball & B. 301; *Daniels v. Davison*, 17 Ves. 433; *Allen v. Anthony*, 1 Mer. 382.

⁶ *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Hall v. Smith*, 14 Ves. 426; *Daniels v. Davison*, 16 Ves. 249, 8. C. 17 Ves. 433; *Allen v. Anthony*, 1 Mer. 382; *Taylor v. Baker*, 5 Frl. 306 S. C. Dan. 71, and the reporter's note.

pied part of the other's estate, A.'s being freehold and B.'s leasehold; B. became bankrupt, and the particulars of sale of his estate described it as "late of the residence of B." as leasehold, and containing the number of acres mentioned in the lease. The quantity of acres was made up by the freehold taken in exchange; but the purchaser did not know that it was freehold: and it was held, that this was not implied notice to the purchaser of the agreement for exchange, and that he might therefore recover in ejectment that portion of B.'s estate which was in A.'s possession.¹

It frequently happens that a purchaser is willing to complete the contract for purchase before the proper investigation of the title is complete; and he may urge his solicitor to accept it before all the requisitions of counsel are complied with. When, however, it is remembered, that on a future sale or mortgage the expense of all these uninvestigated inquiries, and the satisfaction of all encumbrances, will fall on the purchaser himself, it will be prudent for the solicitor to resist the completion of the purchase until every difficulty has been removed. And if, in spite of his opinion to the contrary, the purchaser insist on the acceptance of the title, the solicitor should take a written authority from his client so to do, as that will exonerate him from all responsibility.

Where the title is approved, it will be then proper to instruct counsel to prepare the purchase deed. In all important transactions it will be most prudent for the solicitor not to undertake this duty himself; for wherever a professional man gives his services to a client, whether to prepare a deed or will, the law requires that he shall prepare it with a perfect knowledge of its legal operation, and will render him responsible accordingly.²

The Duty of Counsel.

It is the duty of the counsel before whom the abstract is laid, to decide upon the validity of the title. He must see that it commences at the proper time, and that it is properly deduced; he must consider whether the instruments abstracted will effect the end proposed in preparing them; and whether the persons executing

¹ *Miles v. Langley*, 1 Russ. & Myl. 39.

² See *Seygrave v. Kirwan*, 1 Beatt. 166.

them had the power effectually so to do : he must see that the facts on which the validity of the abstract depends are supported by the proper evidence, and he must point out what that evidence should be ; and he must demand every document not produced, which may elucidate in any manner the state of the title. He should point out any defects in the title, and, if they admit of a remedy, should propose it ; but if he be satisfied of its validity, he may state the most advisable mode of effecting the sale, mortgage, or charge intended by the parties.

The counsel for the purchaser, mortgagee, &c., should see that there is a clear deduction, as well of the legal as the equitable estate, and that all the particular estates are determined, or can be conveyed to him or for his benefit ;¹ and that there are no incumbrances on the estate, such as mortgages, annuities, rents, crown debts, judgments, statutes, legacies, portions, rights, or titles of dower or curtesy, or outstanding terms.

He is not to judge of the prudence of accepting the title, but simply state all the objections to it. He must point out the facts, and show the real state of the title. And he should always remember, that he ought to insist on such a title for the purchaser as may not only be quietly enjoyed, but which he may compel a subsequent purchaser or mortgagee to accept.

On the examination of an abstract, counsel should, in the first instance at least, very rarely call to his assistance the doctrines of presumption, to explain or relieve the difficulties which occur in its perusal. He must insist on direct evidence of a good title ; but if that cannot be given, he may then take into consideration how far courts of justice will presume that the difficulties which he feels do not exist.

When other deeds or instruments are referred to in the abstract, in the recitals or elsewhere, they must be called for and examined.

All outstanding terms must be assigned to attend the inheritance, or merged. The legal title to them must be regularly deduced, and the assignment taken from the person in whom the legal estate is vested.

¹ See *Berkley v. Dauh*, 16 Ves. 390.

Inquiry should be made for the wills of such persons as have died seised in fee. And where a person seised in fee or in tail has married, inquiry should be made for his marriage settlement, as it is unusual to marry without a settlement of the property of the parties; and an affidavit before a Master in Chancery is sometimes demanded, that no settlement, or agreement for a settlement, in fact exists. Inquiry should also be made when there is any doubt on the point whether any agreement or covenants as to dower exists.¹

It frequently happens that it is essential that the consideration money shall be paid in some particular manner, or to particular persons; and where this is the case, it will be the duty of counsel to see that it has been properly paid, and that the proper receipts have been taken for it. It will of course be seen, in such cases whether the deed or will under which the money is paid contains the usual clause for making the trustees' receipts sufficient discharges.

The parcels demand the strictest attention from the conveying counsel. He must trace them with the greatest care through the different deeds, wills, and documents contained in the abstract. If the identity of the lands to be sold or charged with those in the abstract is doubtful, the fact must be authenticated by extraneous evidence, as by the production of the assessments to the land-tax, poor-rates, &c., for the last twenty or thirty years; and where these have not varied, except in the name of the owner, it will be reasonable to presume the identity of the parcels.²

Counsel should never rely on the expressions, "fine levied and recovery suffered accordingly." It should be seen, by the production of the proper evidence, that these assurances actually exist.

If counsel discover any defect, it will of course be his duty to point it out, however small the property may be, or whatever sum may be advanced upon it. He will more readily accept a title which has recently passed through the hands of several purchasers, than one which is quite fresh in the market.

¹ See 3 & 4 Wm. 4, ch. 105, sec. 11.

² 3 *Pres. Abs.* 33.

A common report that a title is bad, will also provoke a more than usually careful examination. Where a defect occurs in an abstract, it should be seen whether it has not been cured by adverse possession, non-claim on a fine, or by the release or confirmation of the persons capable of releasing or confirming; or whether from any other cause, it has not become immaterial.¹

Where a valuable consideration is necessary to the validity of the deed, as in a bargain and sale, attention must be paid to this circumstance; but where the fact of payment is not mentioned in the deed, it may, nevertheless, be averred, and proved to have been paid.²

It should always be seen that there are grantors to the deed, who are properly qualified, both as to their estates and their personal abilities; that there are grantees capable of receiving a grant; that there are proper words of grant; that there is a subject matter to be granted which is sufficiently described; that the estate is well limited, in point of law, and by proper and technical words, and that it is not too remote.

In examining an abstract, no portion of legal learning is so thoroughly essential as that of uses and trusts. It will always be particularly necessary to consider the operation of a deed, and its limitations, first, as to its effect at common law, and next, under the Statute of Uses, and, in particular, in what person or persons the legal estate is vested. The rules as to the merger of estates will also come into constant operation in examining an abstract of title. Where the legal estates is found to be vested in one person, and the equitable estate in another, the histories of the legal and equitable titles should be traced distinctly throughout the abstract. So the history of the outstanding terms should be traced distinctly from that of the fee, as this plan will be found greatly to facilitate the perfect comprehension of the exact state of the title.

Counsel must also pay particular attention to the recent alterations in the law, and their bearings on the particular title under consideration.

¹ 2 *Pres. Abs.* 26.

² 1 *Pres. Abs.* 200; see *Row v. Inhabitants of North Wingfield*, 1 B. & Ad. 916.

Where also there have been several mortgages of the lands which have been respectively transferred to different owners, it will be found better to keep the several mortgages distinct, and also the title of the equity of redemption.

The fact that a mortgage previously existing appears to have been discharged by a certificate under the statute, does not relieve the purchaser's solicitor from the responsibility of examining the certificate of discharge.

The statute¹ giving such certificate the effect of a re-conveyance, rendered it imperative, that it should be in the form prescribed by the act, and duly proved by the oath of a subscribing witness. The form given in the act showed that two witnesses were necessary to its due execution, and the Registry Act of 1865,² expressly requires two witnesses, but the subsequent Act of 1867,³ declares that one witness shall be sufficient.

Since the 18th September, 1865, it is not imperative that the certificate shall follow exactly the form prescribed, the words "or to the like effect," being used.⁴

The statute⁵ further provided that upon such a certificate being presented to the Registrar of the county, he may write the word "discharged" and affix his name in the margin of the register, wherein the mortgage has been registered, and the same shall be deemed a discharge thereof; and such certificate shall be filed and numbered, and entered in the margin of the register, under the word discharged.

By the Registry Acts of 1865,⁶ and 1867,⁷ the Registrar is to register the certificate at full length in its proper order, and number it like other instruments, and he is to make, in a prescribed form, and sign an entry in the margin of the register, wherein the mortgage is registered.

1 9 Vic. ch. 34, sec. 23; Con. Stat. U. C. ch. 39, sec. 57.

2 29 Vic. ch. 24, sec. 58.

3 Ont. Stat. 31 Vic. ch. 20, sec. 60.

4 29 Vic. ch. 24, sec. 58; Ont. Stat. 31 Vic. ch. 20, sec. 60.

5 Con. Stat. U. C. ch. 39, sec. 58.

6 29 Vic. ch. 24, sec. 58.

7 Ont. Stat. 31 Vic. ch. 20, sec. 60.

To make the certificate effectual as a reconveyance, it would appear that all these requirements must be strictly complied with, for the words of the statute are, "such certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."¹

Although the executor or administrator of a deceased mortgagee may discharge a mortgage under the statute, which will have the effect of a reconveyance, he could not sell or assign the legal estate in the land prior to 19th of December, 1869.² But by a recent statute, the powers of executors and administrators as to dealing with mortgages have been extended, and they can now execute assignments "which shall be as effectual as if the same had been made by the person having the legal estate."³

A discharge executed by one of several executors is not a valid discharge, all should join.⁴ A foreign administrator cannot give an effectual discharge; to do so he must first take out letters of administration in this Province.⁵

When a deed is to have a peculiar operation, as that of a feoffment, it should be first seen that the proper ceremonies have been complied with; and if a deed cannot operate in the mode in which it is intended to operate, it should be seen whether it may not take effect in some other way. Thus a deed, which will be inoperative as a grant, may take effect as a bargain and sale, or a covenant to stand seised, or *vice versa*. And a feoffment which is defective for want of livery of seisin, may take effect as a grant of the reversion in the premises; and as in most titles there are outstanding terms of years or occupation leases, most instruments, if they fail to take effect as the intended assurance, will operate by way of grant.

Any extraordinary occurrence in the abstract should always excite suspicion as to the title. Where anything appears for which there is no apparent reason, every possible inquiry as to the title should

¹ Con. Stat. U. C. ch. 80, sec. 59; 29 Vic. ch. 24, sec. 58; Ont. Stat. 31 Vic. ch. 20, sec. 80.

² *Robinson v. Byers*, 9 Grant, 572.

³ Ont. Stat. 32 Vic. ch. 10. This act repeals Con. Stat. U. C. ch. 87, sec. 5.

⁴ *McPhadden v. Bacon*, 15 Grant, 591. But see Ont. Stat. 31 Vic. ch. 20, sec. 82.

⁵ *Re Thorpe*, 15 Grant 76.

made.¹ If a deed is delivered as an escrow, it should be seen that the conditions have been performed, and that the second delivery has taken place.²

Where livery of seisin is essential to the operation of the deed, it should be seen that it was properly made.

Where livery is made or accepted by attorney, the instrument which created the authority ought to accompany the title-deeds, or be within the power of the purchaser; and it should be seen that the feoffor was living at, or after, the time of livery by his attorney; and if the feoffee received livery by his attorney, it should be seen that he was living. The letter of attorney must be by deed.³

In examining the abstract of a deed, it should always be seen that it is stated to be executed by the proper parties, and that the execution is duly attested. The attestation is particularly important in modern deeds; and the want of such attestation ought to be considered as rendering it necessary that there should be a new attestation by the witnesses, if living; and if they be dead, there should be a further conveyance from the parties, as to whom there is not any attestation, or there is not a sufficient attestation, or by those who represent them.⁴ But in ancient deeds, that is to say deeds thirty years old (which prove themselves), evidence of the attestation is not necessary.

Where a particular mode of execution and attestation is required, as, for instance, in the exercise of a power, it must be carefully seen that the deed or instrument is executed and attested accordingly. Where a deed is required to be under hand and seal, it must be signed as well as sealed, and delivered by the party,⁵ and the circumstances of the due execution and attestation must appear as substantive and external facts in the attestation.⁶ It seems also

1 1 *Prest. Abs.* 264.

2 For the late rules as to escrows, see *Doe d. Garnons v. Knight*, 5 B. & C. 671; 8 Dow. & Ry. 342. *Johnson and others v. Baker*, 4 B. & A. 440; *Murray v. Earl of Stair*, 2 B. & C. 82; 6 Park. & Stew. Cont. Byth. 253. *Oliver v. Mowat*, 34 Q. B., U. C. 472.

3 1 *Prest. Abs.* 298; Co. Litt. 52 a.; *Rose v. Power*, 2 N. R. 34; *Freeman d. Vernon v. West*, 2 Wils. 186; *Roe d. Hele v. Rashleigh*, 2 B. & A. 156.

4 1 *Prest. Abs.* 276; and see *Bryant v. Busk*, 4 Russ. 4.

5 *Birds v. Stride*, J. Bridg. 21, cit.

6 *Sug. Pow.* 245.

that the attestation should also specify by whom the deed, &c., made by the exercise of such a power, is signed, sealed and delivered.¹

Where attestation is not required, the fact of signature may be proved *aliunde*; and if the deed is thirty years old, and it appears to have been signed, the presumption of signature may be relied on, since a jury would consider the signature as having taken place at the time of sealing and delivery.²

So, where attestation is required by the power, and not performed, the deeds may be good in equity, on the ground of *contract*, although inoperative at law; but a defective execution of a power by a married woman would hardly be supported even in equity.³

In all modern deeds, there should not only be a receipt for the consideration money in the body of the deed, but also a receipt for the same, endorsed on the deed; and the absence of such a receipt, according to Mr. Preston's opinion, is notice, in equity, that the consideration has not been paid. But in titles depending on ancient deeds, that is, deeds made twenty years ago, or upwards, where the possession has been enjoyed under the deed, the payment of the money will be presumed. So, also, where mortgage-money is paid at one time, and a re-conveyance is afterwards taken, or in similar cases, the receipt in the body of the deed may be depended on.⁴

Although, in general, counsel are not accountable for what does not appear on the abstract, this is not always understood by the parties interested, particularly when a person is employed as standing counsel for the family. In many cases it is proper, and in some it is the duty of counsel to express his opinion so as to take from himself any responsibility from what does not appear on the

¹ 1 *Prest. Abs.* 285.

² 1 *Prest. Abs.* 286.

³ 1 *Prest. Abs.* 286.

⁴ 3 *Prest. Abs.* 16.

abstract.¹ If counsel discover an immediate flaw in the title, it may sometimes be proper to keep it from the purchaser, and inform the vendor of it.²

It is proper to observe, that although counsel approve of a title, yet a purchaser is not bound by his decision, nor is it a waiver of all reasonable objections; and the purchaser may either take an opinion from some other counsel, or the one first consulted may correct his error in a further opinion;³ and, on the other hand, a purchaser will be bound to accept a good title, although his counsel disapprove of it.⁴ And when one of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time and the counsel was of that opinion, a bill by the purchaser for a specific performance with a compensation, was dismissed with costs; and an application afterwards made by the plaintiff, that his deposit-money might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused, with costs.⁵ In an action to recover the deposit, no new objection can be taken to the title, which, if previously taken, might have been removed.⁶

Of the General Nature of the Title which must be Produced.

It will now be proper to consider the nature of the title which must be produced; and I shall first make some observations applicable to its general nature; shall next inquire into the time at which it should commence; and then give the particular rules applicable to every ordinary species of title.

A party who agrees to sell, mortgage, or charge his property, virtually stipulates in law to make a good title;⁷ and he generally enters into an express agreement so to do.

¹ *Butler's Prac. Obs.* MSS.

² *Butler's Prac. Obs.* MSS.

³ *Deverell v. Lord Bolton*, 18 Ves. 515; 2 *Sug. Vend. & P.* 17, 10th ed.

⁴ *Lewis v. Leckmere*, 10 Mod. 505.

⁵ *Williams v. Edwards*, 2 Sim. 78.

⁶ *Todd v. Hoggart*, 1 Moo. & Mal. 128.

⁷ 2 *Sug. V. & P.* 165, 10th ed.

It is said that on a mortgage it is sufficient to produce a good holding title, but that on a sale it will be necessary to show a marketable title, but the distinction rests on very slight grounds, as the same objection may be made to a title in the one case as in the other, and in practice the former is examined with equal strictness as the latter.

A purchaser will not be compelled to take a doubtful title,¹ nor an equitable title.² The title should, in fact, be free from suspicion,³ and will not be forced on a purchaser, either at law or in equity, if he can only acquire it by litigation and judicial decision;⁴ and a case will not be directed to the judges as to the title, unless the purchaser be willing that it should be so directed.⁵

A court of equity will not now, as formerly, decide whether a title is good or bad. It will merely pronounce whether it is such a title as the purchaser should accept, or a marketable title.⁶ The modern rule, although it has frequently met with disapprobation, is now firmly established.⁷ It seems to have been first introduced by Sir Joseph Jekyll, M.R.,⁸ although Lord Eldon has said it commenced in the case of *Shapland v. Smith*.⁹

The distinction between an unmarketable title and a bad title does not, however, prevail at law; for there every title which is not proved to be bad is considered marketable.¹⁰

By a "marketable title" is meant such a title as the Court of Chancery would force upon an unwilling purchaser.¹¹ The settled rule of the Court of Chancery is not to compel a purchaser to accept a doubtful title. Upon the question what is a doubtful title within the rule, each case must, of course, depend on its own cir-

1 *Stapylton v. Scott*, 16 Ves. 272; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559; *Sloper v. Fish*, 2 Ves. & B. 146; *Marlow v. Smith*, 2 P. W. 198; *Price v. Strange*, 6 Mad. 159; *Pott v. Turner*, 4 M. & P. 551; 2 Sug. V. & P. 165.

2 *Cooper v. Denne*, 4 B. C. C. 80; *Trent v. Hanning*, 10 Ves. 500; *Sheffield v. Lord Mulgrave*, 2 Ves. Jun. 526.

3 2 Ves. 59.

4 *Price v. Strange*, 6 Madd. 159; see also *Elliott v. Pott*, 3 Bl. 145; *Hartley v. Pehall*, 1 Peake's N. F. C. 173.

5 *Roake v. Kidd*, 5 Ves. 647; 2 Sug. V. & P. 166.

6 *Vancouver v. Bliss*, 11 Ves. 258-265.

7 See *Stapylton v. Scott*, 16 Ves. 272; *Sloper v. Fish*, 2 Ves. & B. 149; *Briscoe v. Perkins*, 1 Ves. & B. 493; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 569-576; *Price v. Strange*, 6 Madd. 159.

8 *Marlow v. Smith*, 2 P. W. 198; and see *Sloper v. Fish*, 2 V. & B. 149.

9 1 B. C. C. 75; 1 J. & W. 568.

10 See 6 Taunt. 274; see *Boymann v. Gutch*, 7 Bing. 379.

11 *Pyrke v. Waddingham*, 10 Hare 8; *Moulton v. Edmonds*, 1 D., F. & J. 246; *Francis v. St. Germain*, 6 Grant, 686.

cumstances. The doubt, however, must be a grave and reasonable doubt,¹ moral, not mathematical, certainty, being required in matters of title, and remote possibilities, and mere matter of suspicion, being disregarded.²

In a case *at nisi prius*,³ Lord Kenyon said, that it had been solemnly adjudged, that if a party sells an estate without having title, but, before he is called upon to make a conveyance, by a private act of Parliament gets such an estate as will enable him to make a title, that that is sufficient; and that when a plaintiff was able to make a title, and was never applied to by the defendant for it, that he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action brought. But where a man contracted to grant to another a lease to hold from a certain day, and the intended lessor could show no title on that day, the purchaser was at law allowed to rescind his contract, although no time for granting the lease was expressly fixed in the agreement.⁴

A different rule, however, clearly prevails in a court of equity; for although the inclination of a court of equity is in favour of a vendee, and it insists upon the vendor furnishing an unexceptionable title,⁵ it is not necessary that he should have a perfect title at the time of entering into the agreement; for if he can perfect it before the Master's report,⁶ or even on the hearing of further directions,⁷ it will be sufficient, although the doctrine will hardly be carried further.⁸ But where the title is not clear on the abstract at the time of filing the bill, costs will not be given, although it has been established before the Master,⁹ and the court will not suspend the contract with a view to future proceedings to perfect the title.¹⁰ But the costs will be thrown upon the purchaser, though the Master reports that a good title was not shown till after the filing of the bill, if that finding proceeded on the ground that certain evidence

1 *Lincoln v. Archdeacon*, 1 Coll. 102.

2 *Hillary v. Waller*, 12 Ves. 253; *McQueen v. Farquhar*, 11 Ves. 467; *Ward v. Dixon*, 28 L. J. N. S. Ch. 321; *Cattell v. Corall*, 5 Y. & C. Ex. 237.

3 *Thompson v. Miles*, 1 Esp. 184.

4 *Roper v. Coombes*, 6 B. & C. 534; 9 D. & R. 562; *Bartlett v. Tuchin*, 6 Taunt. 250, 8 C. 1 Marsh. 683.

5 *Burroughs v. Oakley*, 3 Swanst. 159.

6 *Mortlock v. Buller*, 10 Ves. 315; *Enery v. Growcock*, 6 Madd. 54; *Langford v. Pitt*, 2 P. Wms. 629.

7 *Paton v. Rogers*, 6 Madd. 256.

8 *Leckmere v. Brasier*, 2 Jac. & W. 289.

9 *Reynolds v. Blake*, 2 Sim. & Stu. 117; *Paton v. Rogers*, *ubi sup.*; *Lewin v. Guest*, 1 Russ. 325;

— *v. Collinge*, 3 Ves. & B. 145, n.

10 *Badaile v. Stephenson*, 6 Madd. & Geld, 366.

has not been previously furnished which the vendor had offered to produce, but which had not been actually produced before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections.¹

An abstract, we have seen, will be complete in equity whenever it appears that, on certain acts done, the legal and the equitable estates will be in the purchaser.²

This rule, however, is properly confined to cases where the vendor, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join, the abstract cannot be deemed perfect until it shows that he has given perfection to the title. Thus, where it was necessary, in order to perfect a title, that a recovery should be suffered for the purpose of barring an old estate tail, vested in a person who was not a trustee for the vendor, the deed making the tenant to the *procipe* and the warrant for suffering the recovery were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards; it was held that a good title was not shown before the commencement of the suit.³

A distinction has been taken between questions of *title*, and those which are mere questions of *conveyance*; the latter class will not be of a fatal nature, and cannot properly be entertained by the court. Thus judgments and annuities are not considered objections to the title, but to the conveyance;⁴ and although annuities and other charges on the property are, in fact, of a much greater amount than the value of the estate, this will not be an objection to the title, but a mere question of conveyance.⁵ So, also, mortgages are considered in the same light, as mere questions of conveyance.⁶

And where an exception was taken to a Master's report in favor of a title, and it was urged that a good title could not be made in consequence of a term attendant on the inheritance being outstanding, which was vested in a lunatic, and that as no commission of

¹ *Long v. Collier*, 4 Russ. 280.

² *Braybrooke v. Inskip*, 8 Ves. 436; 16 Ves. 381; 1 J. & W. 421.

³ *Levin v. Guest*, 1 Russ. 326. And see *Esdaile v. Stephenson*, 6 Madd. & Geld, 366.

⁴ *Boothby v. Walker*, 1 Madd. 199. See *Lodge v. Lysely*, 4 Sim. 70.

⁵ *Berkeley v. Daub*, 16 Ves. 350.

⁶ *Townsend v. Campernoun*, 1 Y. & J. 449.

lunacy had issued, no assignment of it could be obtained; this was held by Sir W. Grant, M.R., to be a question of conveyance and not of title, as the vendor had vested in him, legally or equitably, all the interest in the estate.¹ But where a necessary party to a title is neither at law nor in equity under the control of the vendor, the Master ought to report against the title, unless there be produced to him a legal or equitable obligation on the part of the stranger to join in the conveyance.² And it seems clear, that if the vendor has a right to call upon a party to join in a conveyance, this is a matter of conveyance; if he have no right, it is a matter of title.³

In accordance with these principles, a Master's report that A. with the concurrence of B., can make a good title, is incorrect and exceeds his authority; the report should be that the title is good or bad, and he should not report upon the conveyance.⁴ Therefore, where the title is clear, but there are terms or incumbrances to be got in, the Master reports in favor of the title, and a reference is then made to him to approve a conveyance, and then the question as to the parties to a proper conveyance is entertained. But where a legal fee is outstanding, which was vested long since in persons who would now be trustees for the vendor, and the abstract does not show in whom that legal fee is at present, the objection is a matter of title, and not of conveyance.⁵

There can be no mathematical certainty in a title; a moral certainty is sufficient,⁶ and mere possibilities that the title will be disturbed, as suggestions of old entails or doubts what issue persons have left, will not be considered as substantial objections to the title.⁷ But if a claim exist unsatisfied, the improbability of its being enforced will not render the title valid.

Thus, where the objection to the title was, that there was a reservation of salt-works and mines, in 1704, with a right of entry, though no instance of any claim was known, and the title had been transferred in 1791, without any such reservation upon the usual

¹ *Berkeley v. Dauh*, 16 Ves. 380.

² *Eddalls v. Stephenson*, 6 Madd. & Geld. 366. And see *Lewin v. Guest*, 1 Russ. 325.

³ *Odder v. Rugfin*, 1 Madd. Ch. 440. And see *Onserod v. Hardman*, 5 Ves. 722.

⁴ *Lewis v. Lozham*, 3 Meriv. 429.

⁵ *Wynne v. Griffith*, 1 Russ. 283.

⁶ *Hilary v. Waller*, 12 Ves. 252. *Kingsley v. Young*, 17 Ves. 473. *Lyddal v. Weston*, 2 Atk. 19;

11 Ves. 467.

⁷ *Dyke v. Sylvester*, 12 Ves. 126. *Briscoe v. Perkins*, 1 Ves. & B. 493. *M'Queen v. Farquhar*, 8 Ves. 467; 2 Sug. V. & P. 183.

covenants, it was held to be an objection, giving a right of compensation, as the purchaser did not insist further.¹ So, also, an act of bankruptcy will be an objection to a title, without showing a debt upon which a commission or fiat could issue.² But the mere fact that a suit has been subsequently instituted, and is depending, in which part of the lands are claimed adversely to the vendor, is not a sufficient reason for reporting that a good title cannot be made.³

The strict rule seems to be, that the vendor must procure the fee to be vested either in himself or a trustee for him, and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off.⁴ It is not, however, very usual to insist upon this, unless the title can be perfected without a private act of parliament; in which case the expense of obtaining it is always borne by the vendor.⁵

If a purchaser takes possession of an estate *according to his contract*, he does not thereby waive his right to a good title; and a decree for specific performance, without a good title, will not be pronounced against him, although the property may have become greatly deteriorated in his hands.⁶ The general rule, however, is, that the circumstance of a purchaser taking possession, implies an approval of the title and a consequent waiver of the right to urge objections to it.⁷ But if the vendor, subsequently to the entry of the purchaser, treat with him for a compromise of objections raised by him to the title, he will not be bound by his entry into possession.⁸

So, where an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase-money on a specified day, upon the vendor's making a good title; or otherwise, if such title should not then be completed; upon his executing a

1 *Seaman v. Fawcay*, 16 Ves. 390; but see *Lyddal v. Weston*, 2 Atk. 19.

2 *Lowes v. Lush*, 14 Ves. 547. *Franklin v. Lord Brownlow*, 14 Ves. 550.

3 *Osbaldeston v. A skew*, 2 Jac. & W. 539, and 1 Russ. 160; and see 2 *Sug. V. & P.* 185.

4 See 1 H. Bla. 260.

5 *Sug. V. & P.* 337, 8th ed.

6 *Stevens v. Guppy*, 3 Russ. 171.

7 *Burnell v. Brown*, 1 Jac. & W. 163. *Wilson v. Chaphman*, 1 Jac. & W. 36. *Fleetwood v. Green*, 15 Ves. 504. *Margravine of Anspach v. Noel*, 1 Madd. 310.

8 *Colcraft v. Roebuck*, 1 Ves. Jun. 221; and see *Burroughs v. Oakley*, 3 Swanst. 159; *Salmon v. Watson*, 4 J. B. Moo. 73. *Sug. V. & P.* 10, 11. *Morris v. McNeil*, 2 Russ. 604.

bond to complete such title, and to convey the estate as soon as the same could be completed; the vendor is bound to show a good title, and till a good title be shown, the purchaser, though he had entered into possession, is not bound to pay the purchase-money.¹ A purchaser who has not been in possession, is bound to pay interest on the purchase-money, and take the rents and profits only from the time when a good title is shown, and not from the time fixed by the agreement for the completion of the purchase.²

A person who purchases two lots, is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shown to the first lot.³

Where a title is submitted to the opinion of the court, the purchaser is bound by that opinion, and cannot object to take the title on the ground that the difficulty of the question on which it depends furnishes a sufficient objection to completing the purchase.⁴

Of the commencement of Abstracts of Title.

Every abstract of title to real property must, until very recently, have commenced, at the least, sixty years back, and no purchaser could be compelled to take a title which commenced later, because the Statute of Limitations could not in a shorter period confer a title.⁵ This period was fixed from analogy to the 32 Hen. VIII. c. 2, s. 1, limiting the term for bringing a writ of right.⁶

But by chap. 88, Con. Stat. U. C., one period of limitation is established for all lands and rents, it being enacted, that no person shall make any entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims then within twenty years next after the time at which

¹ *Clarke v. Fauz*, 3 Russ. 320.

² *Jones v. Mudd*, 4 Russ. 118. *Monk v. Huskisson*, 4 Russ. 121, n.

³ *Lewin v. Guest*, 1 Russ. 325.

⁴ *Rushton v. Craven*, 12 Pri. 599.

⁵ *Paine v. Meier*, 6 Ves. 351. 32 Hen. 8, c. 2. 21 Jac. 1, c. 16. And see *Barnwell v. Harris*, 1 Taunt. 480. 2 Sug. V. & P. 152. *Fort v. Clarke*, 1 Russ. 601.

⁶ See *Thomson v. Milliken*, 9 Grant. 359.

the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same. Persons under the disabilities of infancy, lunacy, coverture, or beyond seas, or their representatives, are allowed ten years from the termination of their disability or death, but no entry, action, or distress shall be brought beyond forty years after the right of action accrued. Under this statute which is taken from the Imp. Stat. 3 & 4, Wm. IV., ch. 27, it would seem that a forty years' title may be accepted with safety where there is no circumstance in the abstract to lead to inquiries of an earlier date, or reason to believe that the title took its root from a tenant for life, or from a person who claimed under one.¹

If a certificate of title or chancery deed has been obtained under the Act for Quieting Titles,² the investigation has only to be from the date of such certificate or deed, the same being made by the act,³ "conclusive at law and in equity," and it is declared that "the title therein mentioned shall be deemed absolute and indefeasible, from the day of the date of the certificate, as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions or qualifications mentioned therein, or in the schedule thereto." If no certificate or deed has ever been obtained under the act, the investigation should go back to the Crown grant.

The grant itself, or an exemplification or certified copy, should be read, and not merely the memorandum thereof in the Registry Office.⁴

Old Patents contained certain conditions which have since been dispensed with by the Public Land Act of 1860.⁵ which contains the following enactment—"With a view to remove doubts and to quiet the titles to certain lands heretofore granted, it is enacted that the non-observance and non-fulfilment of the condition imposed in and by certain patents issued for public lands, of taking

1 2 *Sug. V. & P.* 187. *Cotterell v. Watkins*, 1 Beav. 361.

2 29 Vic. ch. 25.

3 Sec. 30.

4 In proceedings under the Act for Quieting Titles, it has been the practice to dispense with the production of the original grant, or any certified copy of it, in two cases, viz., where the lot in question was granted to the University of Toronto, or the Canada Company. In both cases it has been usual on account of the great expense to accept a certificate from the Crown Land Department showing that the particular lot was granted as alleged.

5 23 Vic. ch. 2 sec. 34.

the oaths which may have been heretofore prescribed, in case of any subsequent sale, conveyance, enfeoffment or exchange, by the patentee, or of recording such oaths, within twelve months after having taken possession, in the office of the Secretary of the Province, or of performing certain settlement duties, shall not affect in any way the patent or title of any patentee, or of any subsequent purchaser or proprietor."

The title from the grantee of the Crown may depend on deeds, wills, inheritance, &c. ; and if a perfect title is in this way established, searches must be made as to crown debts, Sheriff's sales, executions, taxes, tax sales, and the statutory liens of Mutual Insurance Companies, &c., before the title is accepted.

If it be possible, the abstract should commence with a purchase deed, will, or settlement, by which it appears that the person from whom the title was derived was seised in fee.

In some instances, it will certainly not be sufficient to show simply a title of forty years, but a title prior to that period must be produced.

Thus, if the abstract commence with a recovery deed, or any other instrument relating to an estate tail, it will be proper to show the creation of the estate tail which is barred by it; although the non-production of this evidence will not render the title invalid.¹

Thus, also, if it commences with an appointment, the deed or will creating the power must be shown, in order to prove the due execution thereof; but if the recital of the deed or will is full and satisfactory, this, in default of other evidence, may be deemed satisfactory.²

If the property is derived from the grant of the crown, the original grant should be shown, in order that it may be seen that there is no remainder or reversion reserved by the crown, which, it is to be remembered, could not, until very recently, be barred.³ But the vendor need not show the intermediate deeds, &c., between the grant and the period at which, by the ordinary rules of practice, the evidence of his title should commence.⁴

¹ *Cousmaker v. Sewel*, Sug. V. & P. App.; *Nouaille v. Greenwood*, Turn. 26.

² 1 *Prest. Abs.* 7, 249.

³ 3 & 4 Wm. IV. ch. 64, secs. 15, 18 and 21.

⁴ 1 *Prest. Abs.* 5, 30, 250.

If the abstract commence with a settlement, which is made in pursuance of articles, it is proper to call for the articles, that it may be seen whether the settlement is in conformity with them.

Where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is, whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a forty years' title without the aid of the recited deeds, and no circumstance to repel the presumption in favor of the title, the court would perhaps compel the purchaser to accept it.¹

Where the abstract commences with a settlement under which a wife claims as tenant in tail, the prior title should be shown, in order that it may appear that the wife was the owner of the lands, and not tenant in tail *ex provisione viri*, in which case she could not bar the entail, unless the heirs inheritable under the entail joined in the recovery.²

Where the abstract commences with the execution of a trust, the deed creating the trust should be produced.³

If the parcels are described as purchased of a particular person, it is usual, if practicable, to show the purchase deeds, to make out the description of the parcels.⁴

Where a title is derived through a long chain of descents, the property having remained for a considerable time in the same family, it is sometimes necessary to go back for a longer period than the otherwise required period, for the purpose of ascertaining the first purchaser.⁵

If the first deed in the abstract refer to a person claiming as devisee, inquiry should be made for the will under which he derives his title. So also, wherever a will is referred to, unless it is of very ancient date, its production should be required.⁶

1 *Prosser v. Watts*, 6 Mad. 59. *Cotterell v. Watkins*, 1 Beav. 361.

2 11 Hen. VII. c. 20.

3 1 *Prest. Abs.* 9.

4 1 *Prest. Abs.* 19.

5 1 *Prest. Abs.* 23; and see *Cotterell v. Watkins*, 1 Beav. 361.

6 1 *Prest. Abs.* 250, 264.

In short, wherever an abstract does not commence with a deed or will, conveying or devising the premises to the original purchaser or devisee, from whom the title originates, in fee, but refers to some prior circumstance or document, it will be proper to extend the usual period of inquiry, because such reference will be notice to the purchaser or mortgagee of the contents of the documents so referred to.¹ And in one case, where a will eighty years old was discovered after the purchaser had accepted the title, and whereby the title was supposed to be affected, it was referred to the Master to consider what effect this will would have upon the title.²

Sometimes the first deed in the abstract is of a date falling within the required number of years, but the history of the title is traced through a period of that duration, by showing, either from the recitals, or from a short history of the title in the description of the parcels, or from the assessments to the land tax, or from a schedule of title-deeds, that the ownership on which the title depends commenced earlier than that period. And this, in general, is deemed satisfactory by conveyancers, especially after an inquiry for wills, settlements, &c., as far as that inquiry can reasonably be prosecuted, or where the property is small.³

And these recitals may the more readily be depended upon, where the lands were parcel of a large property, and the nature of the transaction leads to the conclusion that the deeds remain in the hands of the former proprietor, or were delivered to the purchaser of a larger estate, or where the deeds themselves have been destroyed by fire.⁴

One great objection to the dependence on recitals, is, that the external circumstances of execution and attestation seldom or ever appear, so that these important facts are thus left unproved.⁵

1 *Moore v. Bennett*, 2 Cha. Ca. 246. *Ferrars v. Cherry*, 2 Vern. 384. *Mertins v. Jolliffe*, Amb. 311. *Taylor v. Stubbert*, 2 Ves. Jun. 437. *Daniels v. Davison*, 16 Ves. 249, 17 Ves. 433, S. C. *Allen v. Anthony*, 1 Mer. 3. 2. *Knatchbull v. Grueber*, 3 Mer. 137.

2 *Const. v. Barr*, 2 Mer. 57.

3 1 *Prest. Abs.* 20, 29. 252. *Fort v. Clarke*, 1 Russ. 601. *Cotterell v. Watkins*, 1 Beav. 361.

4 1 *Prest. Abs.* 56.

5 See *Bryant v. Busk*, 4 Russ. 1.

Where title-deeds are produced of a more remote date than the required period, and a defect appears in the title antecedent to it, although a good title could apparently be made from that period, it would seem that a purchaser would not be compelled to accept the title.¹

Of Abstracts of Title of Freehold Property.

It will now be proper to detail the particular rules relating to abstracts of title of all the ordinary kinds of property; and, first, we shall turn our attention to abstracts of title of freeholds. And this may be divided into—

- I. Titles under tenants in fee.
- II. Titles under tenants in tail.
- III. Titles under tenants for life.
- IV. Titles under tenants *pur autre vie*.
- V. Titles under remainder-men and reversioners: and
- VI. Titles under tenants of cross remainders.

1. Titles under Tenants in Fee.

Estates in fee are either—1. Estates in fee simple; or 2. Base, qualified, or conditional fees.² Where a qualification is annexed to a fee, it is base, or qualified; where a condition is annexed, it is conditional.

1. A tenant in fee simple may grant any less estate, or charge his estate in any manner he thinks fit, or annex to it any conditions he pleases, so as such conditions be not repugnant to the rules of law, and in particular the law against perpetuities.³

¹ See *Prosser v. Watts*, 6 Madd. 59.

² *Plowd.* 557.

³ *Com. Dig. Tit. Estate* (G. 2.); *Doe d. Vaughan v. Meyler*, 2 M. & S. 276. *Co. Litt.* 1 b.

2. A tenant of a base, or determinable, or conditional fee, will have equal powers over his estate, to a tenant of an absolute fee-simple, with the exception, that while the estate continues determinable, an estate derived out of this determinable estate will be subject to the same determination, according to the maxim, *cessante statu primitivo, cessat atque derivativus*. But when the estate shall become indeterminable, the derivative estate will become absolute.¹

Power is given by the Imperial Statute, 3 & 4 Wm. IV. c. 74, s. 19, where an estate tail has been converted into a base fee, to enlarge such base fee into a fee simple, saving always the rights of all persons in respect of estates prior to the estate tail, which had been converted into a base fee, and the rights of all other persons, except those against whom such disposition is authorised to be made. And by section 39, base fees, when united with the immediate reversion, shall be enlarged instead of being merged.

2. Titles of Tenants in Tail.

All alienations and all charges by a tenant in tail will be good against himself, to the extent of his estate and interest; and if he afterwards acquire the fee simple, they will be as good as if he were seised in fee simple.² It is to be observed, that a material change has been made as to the power of a tenant in tail, by the act for the abolition of fines and recoveries,³ and the substitution of a deed to be enrolled in Chancery in their place.

A grant or lease will bind the issue in tail, until avoided by their entry or action.⁴

Where a discontinuance is effected, the estate of the tenant in tail, and of those who had the reversion or remainder, will be turned into a right of action; and while the discontinuance remains in force, the new estate will subsist, until avoided by the action of the issue in tail, or of the persons in remainder or reversion.⁵

¹ 1 *Prest. Abs.* 378.

² 1 *Prest. Abs.* 380. 1 *Saund.* 260. n. (1)

³ 3 & 4 Wm. IV. c. 74.

⁴ *Neville v. Rivers*, 7 T. R. 276.

⁵ 1 *Prest. Abs.* 382.

A feoffment, a fine, a release, or a confirmation with warranty by a tenant in tail, will create a discontinuance; but if a fine were levied with proclamations, it barred the issue.¹ This assurance is now abolished.²

A lease and release, bargain and sale, or covenant to stand seised, will not create a discontinuance; and the estate created by these assurances may be avoided by the simple entry of the issue, or persons in remainder or reversion.³

A partial discontinuance may be created by a lease for the life of the grantee, with livery of seisin, which may be enlarged by a grant of the new reversion created by the lease and livery; but unless it be so enlarged, it will cease on the determination of the estate conveyed by the lease.⁴

A lease and release and fine, as parts of the same assurance, worked a discontinuance by reason of the fine; but if a lease and release were first executed, and a base fee were thereby created by a rightful conveyance, a fine with proclamations, levied subsequently by the releasor to the tenant of the base fee for further assurance would not create a discontinuance of the remainder, because the seisin of the remainder was not divested by the first assurance; and a fine by a tenant in tail, not seised by the force of the entail would not create a discontinuance.⁵

A recovery operated rather as a conveyance than as a discontinuance, and enlarged the estate tail into a fee-simple.⁶

It is quite clear that a tenant in tail can now, and could before the recent act,⁷ convey, even by bargain and sale, or lease and release, an estate of inheritance, which will continue as long as the estate tail shall continue, or till it shall be avoided by those who have a right to avoid the same.⁸

¹ *Com. Dig. tit. Est. B. 24, 25.*

² *3 & 4 Wm. 4, c. 74.*

³ *Machil v. Clarke*, 2 Salk. 619 8. C. 2 Ld. Raym. 778, and see *Goodright v. Mead* 3 Burr. 1703.

⁴ 1 *Prest. Abs.* 375. 8 *Prest. Abs.* 220.

⁵ *Co. Litt.* 382, b. *Doe d. Jones v. Jones*, 1 B. & A. 238.

⁶ 1 *Prest. Abs.* 381.

⁷ *3 & 4 Wm. 1V. c. 74.*

⁸ *Seymour's case*, 10 Co. 95. *Machil v. Clarke*, 2 Ld. Raym. 789. *Contra*, *Took v. Glasscock*, 1 *Sandm.* 260. *Litt. ss.* 612, 613, 650.

An alienation by a tenant in tail, although originally avoidable may eventually become absolute, either against his issue, or according to the nature of the assurance against those in remainder or reversion. Thus if a tenant in tail granted to another any estate or interest, and afterwards levied a fine with proclamations, the estate granted became good as against his issue; and if he suffered a common recovery, it became good against those in remainder or reversion.¹ The same rule would apply to an assurance under the recent statute.²

It must be remembered, however, that a tenant in tail can only acquire an absolute fee-simple, where his estate is derived out of a fee-simple; for where it is derived out of a base or determinable fee, he could only, before the recent act,³ by means of a fine or recovery, extend his estate tail to the duration of that base or determinable fee,⁴ and that act has not added to his powers in this respect.

A recovery suffered by tenant in tail did not bar any leases, charges, or encumbrances affecting the estate granted by the tenant in tail himself.⁵ But it barred all conditions and collateral limitations annexed to the estate tail, and all charges which partook of the nature of collateral limitations, and also all charges derived out of the reversion or remainder.⁶

A tenant in tail by gift of the crown for public services, could not bar the entail by fine or recovery, even as against his own issue, while a remainder or reversion subsisted in the crown;⁷ nor has he any greater power in this respect by virtue of the more recent act.⁸

A tenant in tail might, before this act, have devised his estate for charitable purposes, without fine or recovery.⁹

1 See 1 *Saund.* 260, n. (1).

2 3 & 4 Wm. IV. c. 74.

3 3 & 4 Wm. IV. c. 74.

4 1 *Prest. Abs.* 368.

5 *Capel's case*, 1 Co. 62, b.

6 *Benson v. Hodson*, 1 Mod. 108. *Pags v. Hayward*, 2 Salk. 570. *Driver v. Edgar*, Cowp. 379.

7 *Gulliver v. Ashby*, 4 Burr. 1929.

8 *Co. Litt.* 372, b. : 34 & 35 Hen. VIII. c. 20.

9 3 & 4 Wm. IV. c. 74, s. 18.

9 43 Eliz. c. 4. *Prec. Cha.* 390. *Atty. Gen. v. Rye*, 2 Vern. 463.

By this act, s. 38, it is enacted, that a voidable estate by a tenant in tail in favour of a purchaser for valuable consideration, shall be confirmed by a subsequent disposition of such tenant in tail, but not against a purchaser without notice.

III. *Titles Under Tenants for Life.*

Tenants for life are either made so by express grant or devise, and hold either for their own lives or *pur autre vie*, or are so by the operation of the law, as tenants by the curtesy, or in dower. A tenant in tail, after the possibility of issue extinct, is also, for all the purposes of alienation only a tenant for life.¹

A tenant for life may transfer his estate, or he may create an under-lease to be derived out of his estate; but all the estates which he grants, unless through the intervention of a power, will determine when his estate shall have filled the measure of its duration.²

Neither the surrender nor merger of an estate for life, will have any effect to defeat or determine any under-leases granted, or charges created by the tenant for life prior to the merger or surrender. Nor will a forfeiture by tenant for life by tortious alienation or otherwise, involve or prejudice the interests of his tenants, or those who have charges under him.³

Estates for life may be encumbered by judgments, in like manner as estates in fee-simple, with the difference only which arises from the extent of the several estates. The same inquiries as to these charges must therefore be made.⁴

Where there was a devise to A. and her heirs, but if she die, leaving issue, then to such issue and their heirs, the husband is not entitled to be a tenant by the curtesy; for the children take by purchase, and not by descent.⁵

¹ See 3 & 4 Wm. IV. c. 74, s. 18.

² 1 *Prest. Abs.* 427.

³ 1 *Prest. Abs.* 429.

⁴ 1 *Prest. Abs.* 446.

⁵ *Barker v. Barker*, 2 Sim. 249; and see *Sumner v. Partridge*, 2 Atk. 47.

Prior to the 11th of May, 1839, it was necessary¹ to render a bar of dower by the grantor's wife effectual, that she should be examined touching her consent to bar her dower, and that a certificate of such examination should be endorsed upon the deed.

Since the 11th May, 1839, a wife joining with her husband in a deed or conveyance containing a release of dower is sufficient without any examination or acknowledgment.² But when a woman bars her dower by a deed to which her husband is not a party, it is still necessary for her to be examined, and to have a certificate of the examination endorsed on the deed.³

If there is any deed in which the grantor's wife does not join, evidence should be obtained that the grantor was unmarried at the time, or that his wife is since dead, or that for some reason she is not entitled to dower.⁴

Until recently, where one of the grantors in any deed was a married woman, care had to be taken to see that a proper certificate of her having executed the deed, and of her examination before a Judge or two Justices of the Peace was endorsed, that it was correct in form, and shewed that the examination was taken on the day of the execution of the deed.⁵ But by "The Married Woman's Real Estate Act, 1873," the necessity for such examination and certificate is dispensed with, and a married woman may now with her husband's consent convey real estate or any interest therein, release and extinguish powers, and appoint an attorney as a feme sole. By the same act every conveyance heretofore executed by a married woman of or affecting her real estate, in which her husband has joined, is to be taken as valid and effectual to have passed the estate professed to be conveyed, notwithstanding the want of a certificate, and notwithstanding any irregularity, informality or defect in the certificate (if any), and notwithstanding that the conveyance may not have been executed, acknowledged or certified as

1 37 Geo. III., ch. 7; 48 Geo. III., ch. 7; 50 Geo. III., ch. 10.

2 2 Vic. ch. 6, sec. 3; Con. Stat. U. C. ch. 84, sec. 4; and see *Heward v. Scott*, 2 Chanc. R. 274; *Hill v. Greenwood*, 23 Q. B. U. C. 404. But see *Miller v. Wiley*, 17 C. P. U. C. 368.

3 Con. Stat. U. C. ch. 84, secs. 6, 7, 8, 9.

4 *Dyke v. Rendall*, 2 D. M. & G. 309; *Thompson v. Watts*, 2 J. & H. 291.

5 Con. Stat. U. C. ch. 85, sec. 5.

required by any act heretofore in force, or not executed by the married woman in presence of her husband, or on the same day or at the same place at which it was executed by her husband.

It is necessary that the husband should join in the deed, and his merely signing and sealing is not sufficient, he must be named as a party to it.¹

IV. *Titles under Tenants pur autre vie.*

Estates for the life of the tenant himself, will necessarily determine at his death; but estates for the life of another, or for several lives, may devolve from the tenant to his representatives, according to the words of limitation.

Thus, if lands be granted or devised to a man and his heirs, or to a man and his executors or administrators, for the life of another, or for the lives of others, they will, on his death, go to the representatives who are specified; and if lands be granted to a man for the life of another, or the lives of others, they will, on his death, go to executors or administrators, as part of his personal estate, and to be dealt with and distributed accordingly.²

Freehold estates *pur autre vie*, were made devisable by a will executed and attested according to the formalities prescribed for devising estates of freehold estates;³ and even though the will had not been so executed, if the executor took the lands, he would have been a trustee for the devisee.⁴ And now by 1 Vict. ch. 26, sec. 3, amending the law relating to wills, one settled rule is established applicable to every species of wills.

Where a man was entitled to an estate, to him and his heirs for three lives, and devised the land to another without any word of limitation, it has lately been held that the whole estate did not pass, but that the devisee merely took an estate for his life, and

¹ *Doe. d. Bradt v. Hodgkins*, 2 U. C. Jur. 213; *Foster v. Beale*, 16 Grant, 244.

² 29 Car. II. ch. 3, sec. 12; 14 Geo. II. ch. 20, sec. 9; 1 Vict. ch. 26, sec. 6.

³ 29 Car. II. ch. 3, sec. 12. *Westfaling v. Westfaling*, 3 Atk. 465.

⁴ *Ripley v. Waterworth*, 7 Ves. 425.

that the heir of the devisor was entitled to the lands as a special occupant,¹ but this case has met with some disapprobation from the profession, and may, perhaps, deserve re-consideration.²

Estates for a life or lives, though limited to the heirs of the body, are mere estates of freehold, and not of inheritance.³ Therefore neither dower nor courtesy can arise from the seisin of an estate of this description. Nor is an estate tail created. There is merely an estate in the nature of an estate tail, a *quasi* entail;⁴ which *quasi* entail is not within the protection of the statute *de donis*.⁵

This kind of estate admits of limitations by way of strict settlement, as to one for life, remainder to another as *quasi* tenant in tail with limitations over; and unless there be an alienation by the *quasi* tenant in tail, there will be a descent to the heirs of his body, either specially or generally, according to the form of the gift; and, on failure of the heirs of his body, the limitations over will take effect in their regular order by special occupancy.⁶

An estate for lives cannot transgress the rule against perpetuities, as no limitation of an estate for lives can be too remote.⁷

A person who has an estate for the life or lives of another or others, cannot bar the limitations over.⁸

Where there is a limitation to one and his heirs, with a limitation over, by way of executory devise or shifting use, this limitation over cannot be barred by the first taker.⁹

But a *quasi* tenant in tail may clearly bar his issue and the remainders over when he has the first estate, or the concurrence of the prior tenant for life, either by feoffment, lease, and release, or bargain and sale,¹⁰ but not, as it would seem, by will.¹¹

1 *Doe d. Jeffs v. Robinson*, 8 B. & C. 296. S. C. 2 Manning & Ry. 249; and see the reporter's note.

2 The point, however, was much discussed in the argument, and all the principal cases cited. See also *Ellon v. Eason*, cit. by Sir Wm. Grant, M. R. 1 Mer. 670, n. and *Pinker v. Litcott*. Orl. Bridg. 376.

3 *Grey v. Manock*, 6 T. R. 292. *Blake v. Blake*, in the Exchequer, 1736. 3 P. W. 10. by Cox, n. (1.)

4 *Low v. Burron*, 3 P. Wms. 262. *Grey v. Manock*, 6 T. R. 292.

5 1 Prest. Abs. 486.

6 *Fearne Ex Dev.* 386, 4th ed. *Low v. Burron*, 3 P. Wms. 262. *Doe v. Lutton*, 6 T. R. 292 a.

7 *King v. Cotten*, 2 P. Wms. 676. *Low v. Burron*, 3 P. Wms. 262. *Mogg v. Mogg*, 1 Mer. 670.

8 *Dillon v. Dillon*, 1 Ball & B. 77. *Low v. Burron*, 3 P. Wms. 262.

9 1 Prest. Abs. 483.

10 *Doe v. Lutton*, 6 T. R. 289. *Duke of Grafton v. Hammer*, 3 P. Wms. 265, n. (e). *Forster v. Forster*, 2 Atk. 260. *Osbrey v. Bury*, 1 Ball & B. 53. *Blake v. Lutton*, Coop. 778.

11 *Dillon v. Dillon*, 1 Ball & B. 77. *Campbell v. Sandys*, 1 Scho. & Lef. 296. *Blake v. Lutton*, Coop. 185; but see *Doe v. Lutton*, 6 T. R. 293.

Though the *quasi* tenant in tail may bar his heirs or issue where he has an estate in remainder or reversion, expectant on the estate of a prior tenant for life, yet it is not decided that he can, unless he be the owner of the first estate, or obtain the concurrence of such owner, bar the limitations over by way of remainder or reversion.¹ A trust, by way of chattel interest, will not prevent the barring the limitations over by way of remainder or reversion.²

An equitable *quasi* tenant in tail has the like power of alienation over the equitable estate, as the *quasi* tenant in tail of a legal estate.³

Limitations of freehold leases are by analogy within the influence of the rule in Shelley's case;⁴ and limitations which would create an estate tail in lands of inheritance, would confer a corresponding interest in a freehold or copyhold for lives.⁵

For all the purposes of tenure and alienation, and the right of voting at elections, leases for lives at reserved rents are considered as leases conferring a title to the freehold.⁶

If a tenant for three lives, grant a lease for three other lives, the grantor has an estate in reversion left in him, and not a mere possibility of reverter.⁷

It has been decided by the Court of King's Bench in Ireland, that the rule of *possessio fratris* applies to an estate *per autre vie*.⁸

A rent charge *per autre vie*, if the grantor dies leaving *cestui que vie* goes to the grantee's executors, though not named in the grant.⁹

¹ See *Doe v. Luxton*, 6 T. R. 289.

² *Blake v. Luxton*, Coop. 178.

³ *Blake v. Blake*, Exch. 1736. *Cox's P. Wms.* 10, n. 1. S. C. 1 Cox Rep. 266. S. C. Cooper. 178.

⁴ *Ex parte Sterne*, 6 Ves. 156. *Forster v. Forster*, 2 Atk. 259; and *Dillon v. Dillon*, 1 Ball & B. 77.

⁵ *Mogg v. Mogg*, 1 Mor. 670.

⁶ 1 *Frest.* Abs. 442.

⁷ *Hughes v. Howlin*, 1 Fox & Smith, 7; but see contra *Pinler v. Litcott*, Orl. Bridg. 376, who held that, if a man having a lease for the life of himself and two others, B. and C. grants the land for the life of himself, or for the life of B. and C., this passes the whole estate and the freehold for the life in question, and that there was only a contingency or possibility that it might come back to the grantor. It may, however, be mentioned, that many of the opinions of this learned person cannot be regarded as law at the present day.

⁸ *Long v. Nyles*, 1 Fox & Smith, 1.

⁹ *Bearpark v. Hutchinson*, 7 Bing. 178.

V. Title 'under Remainder-men and Reversioners.

A reversion is a vested interest, and the person entitled under it has an immediate fixed right of future enjoyment, which may be aliened or changed as an estate in possession.¹

If a man conveys land in the possession of himself and another, the deed will operate by way of grant as to the lands in the possession of the other, and will be a good conveyance of the reversion of that part,² but evidence of the existence of the reversion must be given.³

If the reversion or remainder is expectant on a lease which was made sixty or even one hundred years ago, the evidence of the title should be deduced from the lessor, because the possession of the tenant is the possession of the reversioner, if rent has been received at any time during that period.⁴

A reversion expectant on an estate for years is present assets;⁵ a reversion on an estate for life, is *quasi* assets;⁶ a reversion expectant on an estate tail, is also assets, although of course of little value.⁷

A reversion expectant on an estate tail is also liable to the judgments, statutes, or recognizances of all those who were at any time entitled to it, whenever such reversion comes into possession;⁸ it is also liable to the leases made by all those who were at any time entitled to it, and to all the covenants contained in the leases, whenever it comes in possession.⁹

It seems now settled that a reversion after an estate tail, being considered as assets, may be sold for the payment of debts.¹⁰

This peculiarity attends the purchase of reversionary interests—that inadequacy of consideration will vitiate the sale.¹¹ The market

1 See *Litt. s. 568.*

2 *Doe d. Wren v. Cole*, 7 B. & C. 243.

3 *Doe d. Kearns v. Sherlock*, 2 Fox & Smith, 78.

4 1 *Prest. Abs.* 254.

5 *Smith v. Angel*, 3 Salk. 854. S. C. 2 Lord Raym. 833. Lutw. 503.

6 *Anon Dy.* 373. b. pl. 14.

7 1 Roll. Abr. 269. *Kellow v. Rowden*, 3 Mod. 253.

8 *Giffard v. Barber*, cit. 1 Ves. 174.

9 *Symonds v. Cudmore*, 4 Mod. 1; *Shelburne v. Biddulph*, 6 Bro. P. C. 356.

10 *Tyndale v. Warre*, 1 Jac. 212.

11 *Gowland v. De Faria*, 17 Ves. 20; *Ryle v. Browne*, 13 Pri. 753.

price will, however, be considered a fair criterion of the value.¹ And although it has been said, that unless the vendor of the reversionary interest is an expectant heir, mere inadequacy of price will not vitiate the transaction;² yet the better opinion seems to be, that the rule that the purchaser of a reversion must prove that he gave the proper price, has so long been considered as settled that it cannot now be altered.³ And although the bargain include property in possession, yet if the bulk of the property is reversionary, the whole contract will be set aside.⁴ It is clear that the sale of a reversionary interest by public auction will be unimpeachable.⁵

VI. *Titles under Tenants of Cross Remainders.*

Where cross remainders are created, the title should be considered separately, as applying to the different farms, or the different parts of the same farm, which are subject to the cross remainders. Thus if a farm called Blackacre be devised to A. in tail, and a farm called Whiteacre be devised to B. in tail, and if either of them die without issue of his body, then both the farms are devised to the other in tail or in fee, these are cross remainders; and the title to the farm Blackacre should be considered distinctly, as if it stood limited to A. in tail, remainder to B. in tail, and the title to the other farm should be considered as if it stood limited to B. in tail, remainder to A. in tail. So if lands be limited to several persons in tail, with cross remainders between them in tail, the title should be considered with a view to each aliquot part, exactly as if that part stood limited to A. in tail, remainder to B. in tail, remainder to C. in tail, &c.⁶

Cross remainders cannot be raised by implication in a deed, although it be evident that the probable intention of the parties was that there should be cross remainders; but cross remainders will be implied in a will.⁷

1 *Headen v. Rosher*, 1 McClell. & Yo. 82; *Scott v. Dunbar*, 1 Molloy, 458; *Potts v. Curtis*, 1 You. 543; *Newton v. Hunt*, 5 Sim. 511; *Wardle v. Carter*, 7 Sim. 490, 1 Sug. V. & P. 448.

2 See *Shelley v. Nash*, 3 Madd. 232; *Whalley v. Whalley*, 3 Bl. 1.

3 *Hinckman v. Smith*, 3 Russ. 433; *Bawtree v. Watson*, 3 Myl. & K. 339.

4 *Lord Portmore v. Taylor*, 4 Sim. 182.

5 *Shelley v. Nash*, 3 Madd. 232; see *Fox v. Wright*, 6 Madd. 111.

6 2 *Presat. Abs.* 100.

7 *Novell v. Novell*, 1 Roll. Abr. 337; *Cole v. Livingston*, 1 Vent. 224; *Twisden v. Locke*, Amb. 663; *Gilbert v. Witty*, Cro. Jac. 656; *Doe v. Wainwright*, 5 T. R. 427; *Doe v. Dorrell*, 5 T. R. 618; *Doe v. Wortley*, 1 East. 416; *Meyrick v. Whishaw*, 2 B. & A. 810; *Leven v. Weatherall*, 1 Brod. & B. 401; *Edwards v. Alliston*, 4 Russ. 78.

Of Abstracts of Title of Leaseholds and Chattels Real.

Personal property in a former period of our jurisprudence, was accounted of very trifling importance, and the laws relating thereto were few and ill-defined; but subsequent events have rendered personal property nearly as important as real property, and it now almost equally divides the attention of the courts. Personal property consists of chattels real and chattels personal. Chattels real partake of the nature of real property; and of this kind are all terms for years in land or real property, annuities charged on land, statutes merchant, &c.¹ Chattels personal are moveable things, such as money, stock in trade, furniture, jewels, &c.²

An interest in land, bounded by a particular event which *may* happen within a given number of years, is also a chattel real. Thus a devise to trustees or executors, "for payment of the testator's debts, and until his debts be paid," confers only a chattel interest, and will go to the executor of the surviving trustee or executor, if the debts are not discharged in his lifetime.³

We shall first consider the rules respecting the titles of chattels real; and this may be properly divided into — I. Titles of leaseholds. II. Titles of terms of years in gross. III. Titles of attendant terms. IV. Titles under tenants from year to year, &c.

I.—Titles of Leaseholds.

Titles to leasehold property should commence with the original lease, and all subsequent assignments should be abstracted;⁴ and they should also contain statements of all the circumstances and facts incident and relative to the property.

In considering titles of leaseholds, it will be proper to see that the lessor has good right to lease, that the lessee is of capacity to receive the lease, the deduction of the title under the term, the

¹ Co. Litt. 43 b.

² 2 Bla. Com. 385.

³ Co. Litt. 42 a.; *Doe v. Simpson*, 5 East, 162.

⁴ 1 Prest. Abs. 12.

description of the parcels, and the words of limitation in the lease.¹

All leases, except those of an infant, will be valid at common law, although no rent is reserved.²

Freehold estates for lives, in lands of the legal estate, must, however created, be transferred by feoffment and livery of seisin, or by lease and release, or some other similar assurance; but estates in lands under terms for years may be transferred by mere writing, except they confer a title to the reversion and services; and under such circumstances there must, it is apprehended, be a grant or assignment by deed.³

When a term of years is in two joint tenants, an assurance by one of them will not pass more than his moiety or share; but one of several executors or administrators may assign the entirety of the lands, or demise them for all or any part of the term;⁴ and an assignment purporting to be from several executors, and executed by one only, will be effectual for the entirety.⁵

It must also carefully be seen that there exists under the lease that duration of interest which is professed to be granted, and that this interest is only determinable at the time and in the manner agreed upon by the parties, and that only the specified rent is payable.

Where the lease is made in consideration of the surrender of a former lease, the reference made to such lease leads to the necessity of investigating the title of the lessor to such lease, and the mesne assignments, as any encumbrance upon them would attach on the new lease.⁶ And it will be proper to see that the surrender was properly made; and if in pursuance of any statute, that its provisions have been complied with.

It must also be seen that the leases have been uniformly granted to the persons who had the former interest. If they have not, and

1 2 *Prest. Abs.* 16.

2 1 *Prest. Abs.* 19.

3 2 *Prest. Abs.* 20.

4 *Prest. Shep. Touch.* 484,

5 2 *Prest Abs.* 22.

6 *Coppin v. Fernyhough*, 2 B. C. C. 291; and see *Nesbitt v. Tredennick*, 1 Ball & B. 29.

two interests are subsisting at the same time in different persons, as mortgagor and mortgagee, the former having renewed in his own name after mortgage made, without a surrender from the latter, the title is defective, but may be made good by the assignment and merger of the interest under the old lease in the new term.

The assignor of a lease should covenant that the lease is good for the assigned term. In renewable leaseholds he must also covenant for the due exercise of the right of renewal. If the reserved rent is considerable, and the purchaser has no means of satisfying himself whether it has been duly paid, a covenant may be inserted from the assignor that it has been duly paid.

In an assignment of leaseholds, the purchaser, except in the case of a purchase from the assignees of a bankrupt, must covenant to pay the rents and perform the covenants contained in the lease on the part of the lessee, and to indemnify the vendor therefrom.¹ And if he does not give a covenant or bond, he will, in general, be liable to an action on the case, to indemnify the vendor against the rents and covenants.²

If the original lessor's assent be necessary to complete the purchase, the vendor, and not the purchaser, must procure it.³

Where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right of re-entry on breach of covenants, the lessee will not be bound to accept the title, even with an indemnity.⁴

Whether a lessee can require the production of the title of the lessor, has been a point frequently discussed. It is generally provided for by one of the articles of sale, and a lessee should always insist on it.⁵ But in the absence of stipulation, a vendor cannot compel a specific performance without furnishing such abstract.⁶ And when a lease is made under a power, either in an act of par-

¹ *Pember v. Mathers*, 1 B. C. C. 52; *Staines v. Morris*, 1 V. & B. 8; *Wiltins v. Fry*, 1 Mer. 244.

² See *Burnett v. Lynch*, 5 B. & C. 589.

³ *Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 2 Marsh. 332; 7 Taunt. 9. As to covenants and conditions against assignment, see tit. "Leases," 4 *Park. & Stew. Cont. Byth.* 485-487.

⁴ *Fildes v. Hooker*, 3 Madd. 193.

⁵ 2 *Sug. V.* & P. 141.

⁶ *Fildes v. Hooker*, 2 Meriv. 424; *Keech v. Hall*, Doug. 32; 3 Madd. 193; *Purvis v. Rayer*, 9 Pri. 483; and see *Deverell v. Bolton*, 18 Ves. 506.

liament or in a private conveyance, the title, so far as it was connected with the power, must be stated.¹

But it has been held, that a lessor who enters into a contract for land, does not thereby impliedly engage that he will deliver to the lessee an abstract of the title to the freehold;² and it was decided at *nisi prius* by Lord Tenterden, that upon the sale of a lease, without any stipulation for making a good title, or for the production of the lessor's title, that the purchaser cannot insist on its production. This was decided on an action for the deposit, brought on account of the title not being produced.³ But this point has since been decided otherwise in a court of law, and the seller was nonsuited, because he had not proved the lessor's title.⁴ And where A., by agreement made on the 31st day of March, agreed to grant a lease of certain premises, *habendum*, from the 29th of September then next, for twenty-one years, in consideration of one thousand pounds, of which ten pounds were paid at the time of the agreement, ninety pounds were to be paid on the 13th of April, and the residue on having possession of the premises, but no time for granting the lease was fixed by the agreement; and B., being called upon to pay the ninety pounds, demanded an abstract of a title, which was refused; whereupon he gave notice that he would rescind the contract, and commence an action to recover the ten pounds which he had paid; it was held that he was entitled to recover, it being proved at the trial that at the time when the action was brought, A. had no power to grant the lease contracted for.⁵

It may, therefore, be now laid down as settled, both at law and in equity, that a vendor of leaseholds cannot make a good title without producing the lessor's title.⁶

Where the contract is between the assignor and assignee of the lease, the general opinion seems to be, that if the assignor can compel the production of the freehold title, the assignee will be entitled to the production;⁷ and where it is impossible for him to do so, a

1 2 *Prest. Aba.* 9.

2 *Temple v. Brown*, 6 Taunt. 60. *Guillim v. Stone*, 3 Taunt. 433; 2 *Sug. V. & P.* 143.

3 *George v. Pritchard*, 1 Ry. & Moo. 417.

4 *Souter v. Drake*, 5 B. & Adol. 992; 2 N. & M. 40; and see *Shepherd v. Keatley*, 1 C. M. & R. 117.

5 *Roper v. Coombes*, 6 B. & C. 584; 9 D. & R. 562.

6 2 *Sug. V. & P.* 143.

7 See *White v. Foljambé*, 11 Ves. 337.

purchaser may recover his deposit and costs.¹ The rule as to the production of the lessor's title does not apply to a bishop's lease, as the mode of granting it is prescribed by the statute.²

Where A. agreed to sell to B. leasehold premises, "as he held the same" for the term of twenty-eight years, and B. agreed to accept an assignment thereof, without requiring the production of the lessor's title, it was held that the true construction of the agreement was not merely that the vendee should not require an abstract of, but should not object to the original lessor's title.³

If a vendor of leaseholds cannot make a good title when required, no time being fixed for granting the lease, the purchaser may rescind the contract.⁴

In regard to the root of a title to leaseholds, where the freehold is to be produced, unless there were reason to suppose that the lessor was only tenant for life, of course an earlier title could not be required than if the freehold itself were sold, nor in such cases could so early a title be called for.⁵

Great difficulty occurs with respect to the title to renewable leaseholds. All public bodies, who grant renewable leaseholds, require the old lease to be given up before they will grant a new one; and when they once obtain possession of a surrendered lease, they will not part with it, or permit a copy of it to be taken. When the lessee sells, he produces an abstract of the subsisting lease and subsequent instruments. Now this is a title it is impossible to accept, however willing the purchaser may be, and although he may have waived calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease, and by means of this reference the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser, and that, again, is notice of the one before that, and so on, to the first lease. And if in any of these the

¹ *Flureau v. Thornhill*, 2 W. Bl. 1078.

² *Fene v. Spencer*, 2 Meriv. 480, n. (a); *Warren v. Richardson*, 1 Yo. 1.

³ *Spratt v. Jeffery*, 10 B. & C. 249. But see as to this case *Shepherd v. Keatley*, 1 Cro. M. & R. 117, and 2 Sug. V. & P. 4.

⁴ *Roper v. Coombes*, 6 B. & C. 684; and see *Thompson v. Miles*, 1 Esp. 184. *Bartlett v. Tuckin*, 6 Taunt. 259. B. C. 1 Marsh. 583.

⁵ 2 Sug. V. & P. 149.

lessee is described as devisee under a will, or there is any thing to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he, the purchaser, had no other knowledge of the fact than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to enquire into the title.¹ Under these circumstances, a purchase of renewable leaseholds of this description can only be recommended where an abstract of the lessor's title is produced, or from other circumstances, the lessor is confident of the validity of the title.

Where the lease has been originally granted by a person or persons who exercise the power of leasing under certain restrictions, as ecclesiastical persons and corporations, tenants in tail, tenants for life, husbands in right of their wives, persons granting leases under powers, &c., great care must be taken to see that they have not exceeded their powers, and that the formalities required by the legislature have been strictly pursued.

In particular, it should be seen, where there have been several successive leases granted, that the former leases have been duly surrendered by the persons who, in point of estate, were competent to make the surrender; and, to ascertain this, the legal estate should be traced, without any regard to the equitable ownership.² "Leases of this nature," says Mr. Preston, "are frequently the subject of settlements, and the renewals are obtained under that preference to the former tenants, which, in courts of equity, is denominated the *tenant right*; and as often as this is the case, the state of the title should be shown during the last sixty years, so that it may appear that the title is good in *equity*, as well as at law, and not affected by any trust founded on the *tenant right*."³ But it must be remembered, that this supposed *tenant right* is a matter of mere indulgence on the part of the landlord, which he may grant or withhold, without being subject to any interference of the courts, although in Ireland, and in some parts of the south of England, this right to a renewal assumes a more substantial form, and may be enforced under what has been called local equity.⁴

¹ *Coppin v. Fernyhough*, 2 Bro. C. C. 291; and *Sug. V. & P.* 160, 161.

² 1 *Prest. Abs.* 16.

³ 1 *Prest. Abs.* 16.

⁴ See *Lee v. Vernon*, 5 B. P. C. 10; *Watson v. Master, &c., of Hensworth Hospital*, 14 Ves. 324.

An executory interest in leaseholds is transmissible to executors or administrators, and may be bequeathed.

There is some little confusion in the cases as to what will constitute an under-lease, and what an assignment. It is generally laid down, that the power of distress is incident to the reversion;¹ and it has therefore been held, that a lessee for years who assigns his term, reserving rent, cannot distrain for the rent.² Where he grants his whole interest, it is generally called an assignment; but if he only retain a reversion of a day, an under-lease.³ But in a case, where the lessor's term would have expired in two months, and he demised it by parol to B. for those two months, it was held, that this was not an assignment requiring a writing, but a lease, of which parol evidence might be given; but being a demise of the whole of the lessor's interest, he could not distrain.⁴ This decision is however opposed to a former case,⁵ where it was held, that all assignments for any term whatever must be in writing. However, in this last case, it is to be observed, the assignee had not taken possession, which seems to be the only distinction between the cases.

II.—Titles of Terms for Years in Gross.

Tenants for years may assign their terms, or make under-leases, or encumber the land with rent-charges, or any like charges.⁶

Whether the term be actually vested, or be limited by way of *interesse termini*, it is assignable.⁷ But a person who has a contingent interest under a term cannot, it should seem, assign the same at law; nor is a term held under a legal title, and limited by way of executory bequest, assignable at law.⁸ But contingent interests under terms and executory interests, and terms reduced to the condition of a right of entry, may be released.⁹ And assignments of contingent or executory terms will, when they are made for a valuable consideration, be supported in equity.¹⁰

1 2 Bl. Com. 42.

2 ——— v. Cooper, 2 Wils. 375; Bro. Ab. t. dette, pl. 39; *Poultney v. Holmes*, 1 Stra. 407; *Parmenter v. Webber*, 2 Moo. 656 S.C.; 8 Taunt. 598; *Burne v. Richardson*, 4 Taunt. 720.

3 *Poultney v. Holmes*, 1 Stra. 407; *Parmenter v. Webber*, 2 Moo. 656 S.C. 593.

4 *Preese v. Corrie*, 5 Bing. 24.

5 See *Botting v. Martin*, 1 Camb. 318.

6 2 Prest. Abs. 1.

7 Co. Litt. 46 b.; *Perk.* s. 91.

8 *Lampel's case*, 10 Co. 46 a.; *Manning's case*, 8 Co. 94 b.

9 *Lampel's case*, 10 Co. 46 a.; *Manning's case*, 8 Co. 94 b.

10 2 Prest. Abs. 4.

Where a term is bequeathed to A. during his life, and after his death to B., the whole term is in A., determinable by his death; and if B. release to A., A. will have the term absolutely; and if A. assign to B., B. will have all the term absolutely.¹

But where a term of one hundred years is bequeathed or granted to A. for fifty years, if A. or B. should so long live; and after the determination of that estate, to C. for the residue of the term, then both A. and C. will have legal titles.²

The creation of the term should be shown from the original deed or will, if it be in existence; or if the deed or will creating the term be lost, the creation of the term should be stated from the recitals, as found in the more ancient deeds.³

It seems to be now the general opinion of the profession, that if the term was created at a distant period, that is to say, sixty years back at the least, the loss of the deed creating the term will not invalidate the title to it, if recitals of it in ancient deeds can be produced. For against all persons, except the lessor and those who claim the reversion or remainder under him, the recitals are evidence of the state of the title, and the lessor, or those who claim under him, cannot by any means, after sixty years, recover the lands, without proof of an actual seisin within that period. To show the seisin they must adduce evidence of the tenancy; and in adducing such evidence, unless in very particular circumstances, (as where a rent is reserved) they must support the title under the term. And though the recital may not be evidence as a recital, yet the recital with possession under it, and agreeable to the same, would be admitted as evidence.⁴

If the deed creating the term be produced, the mesne assignments will in general be presumed.⁵ It cannot, however, be laid down as a general rule, that a purchaser of a leasehold estate can safely accept the title, where any of the mesne assignments have been lost,

1 *Lampet's case*, 10 Co. 46 a.; *Manning's case*, 8 Co. 44 b.

2 *Plowd.* 524; 2 *Presl.* Aba. 4.

3 1 *Presl.* Aba. 11, 248.

4 1 *Presl.* Aba. 12, 349; *Comb.* 340; *Cowp.* 296; *Prosser v. Watts*, 6 Madd. 59; *Townshend v. Champagnon*, 1 Y. & Jer. 531.

5 *Bart v. Baxter*, 2 W. Bl. 1228; *White v. Foljambe*, 11 Ves. 350. But see *contra*, *Crosby v. Percy*, 1 Camp. N. P. C. 308; 8 C. & 1 Taunt. 306, n. (a.)

although he might be able to recover in ejectment if he actually did purchase. Every case of this nature must depend upon its own particular circumstances.¹

III.—*Titles of Attendant Terms.*

The title must also be deducted from the creation of the term through the intermediate period, and the mesne assignments must, if possible be abstracted :² but their correctness will generally be presumed.³

The evidence of creation of the term is usually demanded, although the deed creating it was executed at a more distant period than forty years,⁴ as the possession of the termor is the possession, or rather the continuance of seisin in the owner of the reversion or remainder-man ; and the remainder-man or reversioner cannot be disseised while his tenant continues in possession ; and even though the termor be ousted, yet, while there is a right of entry in the reversioner or remainder-man, a re-entry by the termor will revest the seisin in the reversioner or remainder-man ; but when the reversion or remainder is turned into a right of action, an entry will not restore the seisin to the revisioner or remainder-man.⁵

Terms attendant on the inheritance are considered as absolutely annexed to it ; they follow the descent to the heir, and all alienation made by him.

So also, a term attendant on the inheritance would, in England, only, pass, before the act for establishing one uniform mode of execution,⁶ by a will executed so as to pass real estate ;⁷ but the attendance of terms on the inheritance is regulated by the discretion of the court.⁸

If the person to whom a term has been assigned be dead intestate, and there has been no general administration granted of his effects, or the person to whom such administration has been granted, be

1 2 *Sugd. V. & P.* 97.

2 1 *Prest. Abs.* 25.

3 *Earl v. Boster*, 2 W. Bla. 1228 ; and see *Hillary v. Waller*, 12 Ves. 289.

4 *Townshend v. Champenot*, 1 Y. & J. 531.

5 1 *Prest. Abs.* 240.

6 1 *Vict. c.* 26.

7 2 *Coll. Jur.* 297.

8 *Nurse v. Yarmouth*, 3 Swanst. 611.

dead, either with a will or intestate, or the executor of the termor be dead, intestate, or without having proved the will, or cannot be found, a special administration *quoad* the term, must be sued out, so as to constitute a representative to such person,¹ the expense of which must fall on the vendor, and the business be transacted by his solicitor.²

A purchaser or mortgagee should always insist upon all the deeds relating to an outstanding term;³ but he should also take care to have an actual assignment of it, and never rely on an express declaration of trust in his favour, for this declaration will not be equivalent for all purposes to an assignment, in protecting him against the fraudulent acts of the vendor or mortgagor in secretly creating other incumbrances.⁴

In *Frere v. Moore*,⁵ M. and his wife mortgaged to A. F. by indenture, wherein B. (M.'s trustee of the mortgaged premises, who had the legal estate) covenanted to stand possessed, (subject to a prior mortgage,) for securing to A. F. £2900 and subject thereto, in trust for such person as M. and his wife should appoint. M. and his wife afterwards appointed that B. should stand possessed, subject to the said first mortgage, and subject to the sum of—pounds, due to the representatives of A. F.; in trust for securing to H. £1200. Afterwards M. and his wife appointed that B. should stand possessed, subject to the first mortgage, in trust for securing to T. F., (the representative of A. F.,) the sum of £2714, due on the mortgage to A. F. for £2900, and £2162. due to T. F. before the mortgage made to H., which latter sum was composed of sums owing to him as executor of A. F., and of another person, on notes and bonds, and of sums due to himself on bonds and the balance of an account, all of which were recited in the deed; and it was held that as the mortgagees had all equal equities, and neither had got in the legal estate, the incumbrances were available according to the priority of their several dates only, and they were entitled to no other preference *inter se*.

¹ See *Roll. Abr.* 907, pl. 10; *Isted v. Stanley*, 1 Dy. 372 a.; *Tingrey v. Brown*, 1 Bos. & Pull, 310.

² See *In re the goods of Mary Powell*, 3 Hag. 195-197.

³ See *Stanhope v. Earl Verney, Co. Litt.* 300 b. n. (1); *Maundrell v. Maundrell*, 10 Ves. 271; *Ex parte Knott*, 11 Ves. 613.

⁴ *Ex parte Knott*, 11 Ves. 313.

⁵ 8 Pri. 475.

The oldest terms should be assigned to attend, as they are less likely to be affected by encumbrances, and the subsequent terms should be merged in the inheritance. Where the state of the title requires that two or more should be kept on foot, one term should be assigned to one trustee, and another to another, and if more than two are assigned, in order to prevent their merging in each other, every alternate term, as the first, third, and fifth, may be assigned to one trustee, and the second, fourth, and sixth, to another trustee.¹

Where a term has once been assigned to attend the inheritance although at a period very remote, and it has since been treated as a subsisting term by declarations in subsequent deeds, a purchaser can never be advised to permit the term to continue outstanding, because it is clear that it may be used against him on an ejectment.

Where terms are raised by settlements, it is usual to introduce a proviso that they shall cease when the trusts are at an end. In well drawn deeds this proviso always expresses three events; first, the trusts never arising; secondly, their becoming unnecessary or incapable of taking effect; and, thirdly the performance of them. But in ill-penned instruments it frequently happens that these events are not accurately expressed, or not at all provided for; and in these cases it must be seen whether, in the events which have happened, the term has ceased; for, if it has not, the purchaser must require an assignment of the term.²

IV.—*Titles of Tenants from Year to Year.*

A tenancy from year to year, or for a less term than a year, is assignable, and will devolve on the lessee's executors or administrators, if not parted with in his lifetime.³

A tenant at will, or by sufferance, has no assignable interest.⁴

The former rule of law was, that a possession which began rightfully, could not be considered as having become wrongful by being merely continued after the right of the party in possession had deter-

¹ See 2 *Prest. Conv.* 137; and *Scott v. Fenhoulet*, 1 B. C. C. 60.

² See *Hays v. Bailey*, 3 Sug. V. & P. 4. As to the rule for the assignment of terms, see 3 Sug. V. & P. 1-18.

³ See *Rea v. Aldborough*, 1 East, 598

⁴ *Litt. s. 240*; *Co. Litt. 57 a*; *Stoseper v. Randal*, Cro. Eliz. 156; *Moss v. Gallimore*, Doug. 386, 387.

mined, and that in case of a lease, adverse possession, which was to bar the reversioner, did not commence until the expiration of the term, although the rent was received adversely. This rule is, however, altered by Imp. Stat. 3 & 4 Wm. IV. c. 27, by which (s. 7) it is enacted, that in the case of a tenant at will the right shall be deemed to have accrued at the end of one year next after the commencement of the tenancy, and (s. 8,) that no person, after a tenancy from year to year, shall have any right, but from the end of the first year, or last payment of rent, but (by s. 9) that where rent amounting to twenty shillings, reserved by a lease in writing, shall have been wrongfully received, no right shall accrue on the determination of the lease.

Of the evidence by which Abstracts of Title should be supported.

Having now discussed the principal rules relating to the preparation and examination of abstracts of title, and mentioned the most usual defects which occur in them, it will be proper to consider the evidence by which they must be supported; for it is obvious that however valid or complete a title may be in reality, yet, if the proof of this be defective, it will be greatly deteriorated in value, and, in fact, unmarketable.

It will always be necessary, therefore, to see that an abstract is supported by the proper evidence of the various documents and facts which it contains or refers to, or which are necessary to its validity. A title must be such as may be successfully defended in a court of justice; and the rules of evidence there adopted must be strictly resorted to, in order that the proper proofs of the title may be at all times at the command of the purchaser. And although a purchaser may be well satisfied of the truth of the matter to be proved, he should always insist on the proper evidence of them, because a subsequent purchaser may demand that they should be proved; and this is the more necessary, as, after once completing his purchase, he can seldom demand further evidence from the vendor.

This principle has been discussed in a case in which the circumstances were as follows:—The partners in a banking-house having agreed to take a new partner into the firm, made arrangements for liquidating their debts, and indemnifying the incoming

partner; and one of the old partners, Nathaniel Middleton, in pursuance of this arrangement, conveyed considerable real estate to trustees upon certain trusts; one of which was, that in case the then existing debts of the old partnership firm should exceed forty thousand pounds, the trustees were to make an absolute sale; and there was a declaration that the trustees receipts should be sufficient discharges. In 1807, N. Middleton died, leaving his son, H. N. Middleton, his heir-at-law. In 1809, the trustees sold and conveyed the estates to Hallett; and under the supposition that N. Middleton, died intestate, H. N. Middleton, his son and heir-at-law, joined in the conveyance, and covenanted for title against all persons claiming under his father and himself, and also for further assurance. After the completion of the purchase, a will of N. Middleton's was discovered which rendered it doubtful whether his resulting interest in the estates vested in the trustees was not devised from the heir-at-law. It became important therefore to Hallett to have actual evidence of the fact of the debts exceeding forty thousand pounds, which was recited in his purchase-deed; and he accordingly filed a bill to enforce the production of such evidence. Lord Gifford, M. R., however dismissed the bill with costs, and observed that the purchaser, having admitted the correctness of the recitals at the time of the purchase, and not having set up any charge of fraud, could not enforce the production of farther evidence. He found no case in which a purchaser, after taking a conveyance from an heir-at-law, by deeds which set forth the pedigree of the vendor, had filed a bill stating that there are various books, family bibles, &c., containing entries which prove the pedigree as recited, and insisting, on that ground that these books should be delivered up to him. If he was satisfied with the correctness of the recital at the time when he took the conveyance, he could not afterwards call for proof of its accuracy.¹

A court of equity will not oblige a purchaser to take a title which depends on a matter of fact that either does not admit of satisfactory proof, or is not satisfactorily proved.² But in considering whether a fact is satisfactorily proved, the doctrines of presumption will be ever present to the minds of the court. It will be at present

¹ *Hallett v. Middleton*, 1 Russ. 243.

² *Smith v. Deane*, 5 Madd. 371.

sufficient to observe, that where, in a court of common law, a judge would give a clear direction to a jury to find a particular fact, such fact will, in a court of equity, be considered as without reasonable doubt; but if the fact be such that a judge would leave it to the jury to pronounce upon the effect of the evidence, then the fact will be considered in a court of equity as too doubtful to conclude a purchaser, and he will not be compelled to take a title depending on its proof.¹

We shall now proceed to discuss in detail the rules as to the evidence by which abstracts of title must be supported; and in order to do this the more accurately, we shall direct our attention to the following points. At present we shall endeavour to show, first, in what manner deeds, wills, acts of parliament, and the other ordinary contents of an abstract, must be proved; secondly, in what manner the facts on which the validity of a title depends must be proved; thirdly, we shall advert to the miscellaneous documents which are considered as legitimate evidences of title, and mention how they must be proved; and fourthly, to the secondary evidence which may be resorted to in support of abstracts of title. We shall then consider the admissibility of parol evidence; the rules as to presumptive evidence; the admissibility of an unstamped instrument as evidence: and shortly mention where the production of an instrument may be compelled.

Of the Evidence of the Ordinary Contents of an Abstract.

Deeds.—A deed cannot be given in evidence without proof of its execution; and the production of an instrument at a trial in pursuance of notice will not, in ordinary cases, supersede the necessity of proving it by one of the attesting witnesses. The principle on which deeds have sometimes been admitted in evidence, without proof of their execution, has been that the party producing the deed claimed under it.²

¹ See *Emery v. Growcock*, 6 Madd. 57.

² *Doe d. Tyndale v. Hening*, 6 B. & C. 28; 9 Dow. & Ry. 15; *Prance v. Hooper*, 3 Taunt. 60; *Gordon v. Secretan*, 8 East, 549; *Orr v. Morice*, 6 J. B. Moo. 347; 3 Brod. & B. 139; but see *Jackson v. Allen*, 3 Stark. 74; in which case plaintiff's counsel having called for a deed which was not produced, and having then proved that it was in defendant's possession and the usual notice to produce, then offered to prove a true copy of it. Defendant's counsel then produced the original deed, and insisted it must be proved by the attesting witness, and objected to the reading of the copy; but Abbot, C.J., held that the defendant, having taken the chance that plaintiffs would be unable to prove an examined copy, could not object to the reading of it, and the copy was accordingly read. See also *Vacher v. Cooks*, 1 B. & Ad. 145; but see *Brady v. Walls*, 17 Grant, 699.

A deed thirty years old proves itself, and it is not necessary to call any attesting witnesses to prove it; and when other documents of equal antiquity are produced from the proper custody, no proof of handwriting is required.¹ But if a deed be dated at a later period than thirty years back, it must be proved before it can be given in evidence, and for this purpose the subscribing witness must be produced; and if there be two or more subscribing witnesses, one will, in ordinary cases, be sufficient to prove the execution. If there be a subscribing witness, a stranger cannot give or add his attestation. If the witnesses be dead, all their deaths and handwriting must be proved; and the authenticity of their signatures proves the circumstances of the execution which they profess to attest. When the witness is abroad, it is usual, and seems necessary, to prove the handwriting of the grantor as well as the witness; and this is expressly required by the statute 26 Geo. III.² as to deeds executed in the East Indies, where the deeds are proved without calling the witnesses.³

Where an attesting witness to a deed, on being called to prove its execution, denies having seen it executed, it may be proved by the evidence of the handwriting of the party.⁴

Where a subscribing witness is dead, it will be sufficient to prove his handwriting, without proof of the handwriting or identity of the parties,⁵ even although he signed only by his mark;⁶ and the rule will be the same, although the witness be abroad.⁷

An instrument executed by a mark may be proved from inspection by a person who has frequently seen the party so execute the deed.⁸

The execution of a power of attorney executed abroad, can only be verified in a court of law by the affidavit of the subscribing witness; the certificate of a notary public, therefore, and the attestation

1 *Wynne v. Tyrwhitt*, 6 B. & A. 376. *Doe Macklem v. Turnbull* 5 Q. B. U. C. 129. *Re Higgins*, 19 Grant, 303, and *Moffat v. B.* U. C. 5 Grant, 374.

2 Ch. 57, sec. 38.

3 3 *Prest.* Abs. 73, 74; *Peake*, Ev. 66.

4 *Baker v. Rabeth*, Gow. N. P. C. 175.

5 *Page v. Mann*, 1 Moo. & Mal. 79; but see *Nelson v. Whittall*, 1 B. & A. 19; 7 T. R. 206, n.

6 *Mitchell v. Johnson*, 1 Moo. & Mal. 176.

7 *Kay v. Brookman*, 1 Moo. & Mal. 286, S. C. 3 C. & P. 555; and see *Doe d. Wheeldon v. Pwnt*, 3 C. & P. 613.

8 *George v. Surrey*, 1 Moo. & Mal. 516. *Doe d. Wilkins v. Cleveland*, 9 B. & C. 809; and see *Pedler v. Paige*, 1 Moo. & R. 258.

of the Vice-Consul of the place to the notary's handwriting, which was also sworn to, is not sufficient proof of the due execution of the instrument.¹

A lease for a year is useless in the conveyance of freehold property in many of the colonies. Thus, in Jamaica, Antigua, St. Vincent, Upper Canada, and New Brunswick, various acts of the local legislatures have enacted that deeds duly registered, whether executed there or elsewhere, shall have the operation of conveyances, without livery of seisin, a lease for a year, or any other ceremony. And the same law prevails in Dominica, if the deed be made in the island; but in the other colonies, where the English laws are administered, a lease for a year seems still to be necessary.

In Ireland, the recital of a lease for a year in the deed of release, is sufficient evidence of the lease, and therefore, no lease for a year is prepared;² but the recital must be sufficient. Thus, where the deed of release merely contained the words, "in his (the releasee's) actual possession, being by virtue of a lease made pursuant to the statute," this was held to be an insufficient recital of the lease within the 9 Geo. II. c. 5, s. 16.³

Wills and Letters of Administration.—In England, ecclesiastical courts have exclusive authority in deciding on the validity of wills of personalty, and in granting letters of administration;⁴ and their sentences upon these matters are conclusive evidence of the right thereby determined; but they will not strictly be evidence of any collateral matter which may be collected or inferred from the sentence.⁵ Therefore, letters of administration which have been granted to a person as administrator of the effects of A. B., deceased, are not proof of A. B.'s death,⁶ although it seems probates are considered in practice as evidence of the facts they state.⁷

If the title is derived under a will, the probate, or a copy stamped with the seal of the Surrogate Court,⁸ is ordinarily suffi-

¹ *Ex parte Church*, 1 Dow. & Ry. 324; but see *Garvey v. Hibbert*, 1 Jac. & W. 180.

² Ir. act 9 Geo. II. ch. 5, sec. 16; Ir. act 1 Geo. III. ch. 3.

³ *Doe d. Saunders*, 1 Fox & Smith, 13.

⁴ *Dike v. Potkell*, 1 Lord Raym. 744. *Noel v. Wells*, 2 Keb. 337; 1 Lev. 235; 1 Lord Raym. 302; 3 T. R. 130.

⁵ *Blackham's case*, 1 Salk, 390; *Thompson v. Donaldson*, 3 Esp. N. P. C. 63; and cases in n. (c)

⁶ *Thompson v. Donaldson*, *ubi sup.*

⁷ 1 *Pres. Abs.* 187.

⁸ *Con. Stat. U. C. c. 16, ss. 3, 61.*

cient proof of the will as between vendor and purchaser;¹ and the purchaser's solicitor may, as in the case of a deed, presume due execution according to the purport of a will.

He will observe, whether it purports to have been executed in the presence of two witnesses, and whether the attestation clause states that they subscribed in the presence of each other.² If it does not, an affidavit by one of the subscribing witnesses or some other person who saw the will signed, testifying the actual fact, may be called for.³ It must be remembered that a will proves itself thirty years from its date, and not from the death of the testator.⁴

The Court of Common Pleas has, however, decided⁵ that it is not necessary that the witnesses should subscribe in the presence of each other; their subscribing in the presence of the testator is sufficient, though they do not subscribe in the presence of each other.

In the case referred to, the Court held that the statute which says, "It shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator;"⁶ does not repeal the clause in the Statute of Frauds relating to wills,⁷ but merely extends it, and that therefore, a will subscribed by the witnesses in accordance with the provisions of either Act, is sufficiently attested.

In delivering judgment A. Wilson, J., said, "The statute of Charles has not, in express terms, been repealed as to wills; and, so far as it has not been repealed by enactments inconsistent with its maintenance in part or in whole, there is no reason why it may not be considered as still an active law here. Now, under that statute it was a positive direction that the witnesses should subscribe and attest the will *in the presence of the deviser*, otherwise the will should be utterly void and of none effect.

"There is nothing inconsistent in our amended law and this provision subsisting together: on the contrary, it rather seems that the

1 Cov. Con. Ev. 91, 92.

2 Con. Stat. U. C. ch. 82, sec. 13.

3 Cov. Con. Ev. 94, 97.

4 *Mann v. Ricketts*, 7 Beav. 98.

5 *Crawford v. Curragh*, 15 C. P. U. C. 65.

6 Con. Stat. U. C. ch. 82, sec. 13.

7 29 Car. 3, ch. 3, sec. 5.

Legislature intended that this part of the old law should yet continue to be the law; leaving it, however, to the devisor to pursue either the new law or the old law, according to circumstances or his own convenience—that is either to see the witnesses subscribe the will, or if he did not, that they should see each other subscribe it, and, therefore, we are of opinion that, under the provision, ‘It shall be sufficient if such witnesses subscribe their names in presence of each other, *although their names may not be subscribed in the presence of the testator*,’ the law of this province does not prevent a will being still subscribed by the witnesses in the presence of the devisor, as it might have been before the passing of the late act, under the statute of Charles; and that the new provision has extended the old law by making it *sufficient* if the witnesses see each other subscribe the will, although the devisor may not have seen them.

“We are of opinion, then, that although the will was not subscribed by the witnesses in the presence of each other, it was not, nevertheless, void for that reason, but that a subscription by them in the presence of the devisor was, if it be established, a sufficient subscription according to our law.”

If the testator was a marksman, the attestation should state that the will was read over and explained to him, and if the attestation is silent as to this, the purchaser may require proof from one of the witnesses, or some other person present, that the will was read over and explained.¹

Where the will has not been proved, the vendor must produce the original, if it happens to be in his possession.² If the will relates to real estate only, and has been neither proved nor registered, or if relating to personal estate also, it has not been proved, inquiry should always be made as to the reason for this omission. The will may have been revoked by the testator, and the inquiry may lead to the discovery of this.

In England, a purchaser from a devisee was, under circumstances, held in one case to be entitled to require the devisee, as a condition

¹ Cov. Con. Ev. 95.

² Sug. V. & P. 414.

of specific performance against the purchaser, to establish the will against the heir, though the general rule is otherwise.¹ In another case of a purchaser of real estate, the vendor was required to prove a codicil in the Ecclesiastical Court.

Where a will has been executed, it must be produced before a purchaser can be compelled to accept the title,² although having been treated as a nullity by a professional man, it has been mislaid, and the vendor being heir, has rested upon his title as heir.³

The exact terms of the devise through which the vendor claims, and the effect of the words used, must be carefully considered, as difficulties of construction often arise.

The general rule as to the admissibility of parol evidence in the construction of wills is, that if there be a latent ambiguity raised by extrinsic circumstances, it may be explained by the same means, but if the ambiguity be patent, that is, arising on the face of the will itself, all reference to matters dehors the instrument is, as a general rule, strictly forbidden.⁴

In the case of will executed by persons dying before the first day of January, 1869, the will was construed as speaking from the date of its execution, and property acquired by the testator after the date of the will, did not pass under the will. If, however, in the case of any person dying after the 6th day of March, 1834, the will contains "a devise⁵ in any form of words of all such real estate as the testator shall die seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been or may be acquired by the deviser after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof."

In the case of *Whateley v. Whateley*,⁶ where the words of the will were, "I give all my real and personal estate to my executors and trustees for the purposes of this my will," Mowat, V.C., after

¹ *Grove v. Bastard*, 3 Ph. 619.

² *Hubback on Suc.* 65.

³ *Stevens v. Guppy*, 1 S. & S. 439.

⁴ *Taylor on Ev.* 944, *Con. Con. Ev.* 103.

⁵ *Con. Stat. U. C.* ch. 62, sec. 11.

⁶ 13 Grant, 496.

quoting the words of the statute,¹ said: "I see no sufficient reason why such a devise as this will contains should not be held a sufficient compliance with this provision. . . . I think that a devise in this form shows an intent to pass all the testator should have at his death, and that all the statute demands is a devise in any form of words which shows such an intent."

On a rehearing of the case,² the decree pronounced by Mowat, V.C., was reversed, the Chancellor and Vice Chancellor, Spragge, holding that a devise in such a general form was not sufficient to pass after-acquired estate. The Chancellor, in delivering his judgment, said, the Legislature are "careful merely to say that, if the testator in any form of words devises after-acquired real estate, it shall pass. They have not said that without any such form of words it shall pass under a mere general devise of realty. To hold that this was the meaning of the Legislature would be to reverse the whole law as it then stood, and to require that, where parties did not intend their after-acquired property to pass, they should use restrictive words. But the Legislature have not said this. It seems to me that they leave the law as it was, unless the parties choose to extend the operation of the will by some form of words embracing after-acquired real estate." [And V. C. Spragge said, "In a will of personal estate there is an expressed intention that it should be a bequest of what the testator has at the time of his death, because the law gives his words expression as at the time of his death. But our statute making no such rule as to real estate, requires the testator to express an intention as to after-acquired property if he has such intention. The language of the statute, 'a devise in any form of words of all such real estate as the testator shall die seised or possessed of,' implies or rather requires that the testator must in some form of words express it to be his intention to devise his after-acquired real estate. The words, 'I give or I devise all my real estate,' do not import such intention: the reason being wanting, which, in the case of personal estate, imputes such intention to the testator. There is, however, this point in the case before us. The testator joins together his real and personal estate making one disposition of both in these words, 'I

¹ Con. Stat. U. C. ch. 82, sec. 11.

² 14 Grant, 480.

give all my real and personal estate.' Is that a form of words denoting an intention to devise after-required real estate? or may it not with equal propriety be said that they denote an intention on the part of the testator to limit his bequest of personal estate to what he then possessed? I think the proper construction of the will, is to read it, as to each kind of property, as the law requires it to be read, if each were expressed separately."

Although two members of the Court took this view of the statute, V. C. Mowat adhered to his original judgment, and after remarking that "the leading principle according to which wills are interpreted, is the intention of the testator;" and reviewing at length the authorities bearing on the subject, he said,¹ "I read the clause in our act as rendering valid devises of after-acquired real estate, and requiring for this purpose nothing more than any words which show the intent to pass the property. Thus, if a testator having contracted and paid for land, Blackacre, makes a will, and subsequently obtains the conveyance, his devise of Blackacre by description would, I apprehend, give the devisee the legal as well as equitable interest therein: for it is surely not necessary for this purpose that the will should be expressed as devising any or all 'the estate in Blackacre that the testator may die seised of.' To require a residuary or general clause to make an express reference to after-acquired property appears to me to be demanded by no sound rule of construction; to serve no good purpose; to create an unnecessary and indefensible distinction between the words which pass after-acquired personal estate;—and to force upon wills wherever the rule is applied, a meaning and an effect contrary to the intention of the testator."

Subsequently, however, the law was altered, and by an act of the Legislature of Ontario,² it was provided, where the deviser died after the 1st day of January, 1869, that, "Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

¹ 14 Grant 448.

² Ont. Stat. 32 Vic. ch. 8.

"No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, (except an act by which the will is revoked), shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death."¹

"Every will shall be revoked by the marriage of the testator, except a will made in the exercise of a power of appointment, when the real or personal estate would not in default of such appointment, pass to the testator's heirs executor or administrator, or the person entitled as the testator's next of kin under the statute of distributions."²

"No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."³

"No will or codicil, or any part thereof, shall be revoked otherwise than aforesaid, or by another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence and by his direction, with the intention of revoking the same."⁴

The original English statute of wills,⁵ authorized every person having lands, &c., to devise them; and under that statute it was the opinion that a married woman could not make a valid will of lands. But as "divers doubts, questions and ambiguities" had arisen, or were apprehended on that and other points, the statute 34-35 Hen. VIII, ch. 5, was passed to remove them, and by the 14th section of that act such devises by married women were expressly prohibited.

A married woman might, however, make a testamentary disposition of her real estate under a power,⁶ by way of execution of such

¹ Sec 2.

² Sec. 3. By a clerical error in the original Act, the word "not" was left out. The Act is printed here as amended by Ont. Stat. 35 Vic. ch. 15. sec. 3.

³ Sec. 4.

⁴ Sec. 5.

⁵ 22 Hen. VIII ch. 1.

⁶ *Lovelass on Wills*, 267.

power ; and equity carried into effect the will of a married woman disposing of her real estate in favour of her husband, or other persons than her heirs at law provided the will was in pursuance of a power reserved to her.¹ The power to make a testamentary disposition of her estates might be conferred upon a married woman by a settlement either before marriage or subsequently thereto ; and it might emanate either from her husband or from a third person. It should appear upon the face of the will, made by a married woman, that it was made in pursuance of the power.

By the statute giving married women certain separate rights of property,² " From and after the said 4th day of May, 1859, and hereafter, every married woman may, by devise or bequest, executed in the presence of two or more witnesses, neither of whom is her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was or be acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to husband, or as she may see fit, in the same manner as if she were sole and unmarried ; but her husband shall not be deprived by such devise or bequest of any right he may have acquired as tenant by the curtesy.

This 16th section of the act was not construed as confined to property given independently of the act to the separate use of a married women ; and the real estate of a married woman having been in the possession of her husband before the 4th of May, 1859, did not prevent her from making a valid devise of it under this act.³

This statute did not in any way affect the rights of a married woman to execute a will in pursuance of a power.

By an act passed during the recent session of the Legislature of the Province of Ontario, and entitled " The Wills Act, 1873," material alterations have been made in the law relating to wills. All the acts previously in force in Ontario seem to be by that act repealed.⁴ By the

1 *Wright v. Englefield*, Amb. 468 ; S. C. nom. *Wright v. Cadogan*, 2 Eden, 239.

2 Con. Stat. U. C. ch. 73, sec. 16.

3 *Re Hüliker*, 3 Chan. R. 73.

4 The various statutes set out in the schedule to that act as repealed are the Imperial Acts 32 Hen. VIII. ch. 1 : 34 & 35 Hen. VIII. ch. 5 ; 29 Car. II., ch. 3, sec. 5, 6, 12, 19, 20, 21 & 22 ; 4 & 5 Anne, ch. 16, sec. 14, 14 Geo. II. ch. 20, sec. 9 ; 25 Geo. II. ch. 6. Canadian Acts, Con. Stat. U. C. ch. 73, sec. 16 ; Con. Stat. U. C. ch. 22, sec. 11, 12 & 33, 29 Vic. ch. 38, sec. 13, 14, 15, 16, 17 & 22. Ont. Stats. 32 Vic. ch. 8 : 33 Vic. ch. 13 ; 35 Vic. ch. 15.

act, the terms "person" and "testator" shall include a married woman. No will made by a person under the age of twenty-one shall be valid. Every person may devise, bequeath or dispose of by will, all real and personal estate which he shall be entitled to, either at law or in equity, at the time of his death; and which, if not so devised, bequeathed or disposed of, would devolve upon his heir at law, or upon his executor or administrator. The power to dispose so given, extends to all property, including estates *pur autre vie*, contingent interests, rights of entry, and property acquired after the will. No will is to be valid unless in writing, and signed at the foot or end by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

The 32 Vic. c. 8, is then re-enacted, the third section being re-enacted as amended by the 35 Vic. c. 15, s. 3.

The act contains other important provisions as to interested parties being subscribing witnesses, lapsed devises sinking into residuary devises, leaseholds passing under general devises, general gifts including realty and personalty over which the testator has power to appoint, the import of the words "die without issue," &c.

The repealed sections of the Property and Trusts Act are re-enacted as sections 31, 33, 34, 35, 36 and 37 of the Wills Act.

Provision is made for powers of sale, &c., being exercised by an executor where no other person is named to exercise them. Where a will gives power to the executor to sell, dispose of, mortgage, encumber or lease any real estate, the powers may be exercised by an administrator with the will annexed. He may also exercise such powers where the will names no person to do so.

An executor or administrator may also convey in pursuance of a contract entered into by the deceased, where he has died intestate, or has not provided by will for such conveyance.

It is further provided, that where there are several executors, administrators, or administrators with the will annexed, and one or more of them dies, the powers created by this act shall vest in the survivor or survivors.

A probate unrepealed is conclusive evidence in civil cases, of the validity of a will;¹ and is the only legitimate evidence of personal property being vested in an executor, or of the appointment of executor, the original will not being admissible for that purpose;² and the original will cannot be read in evidence upon the mere production of it by the officer of the Court, without an endorsement upon it, for the purpose of authenticating it.³ But after notice is given to produce the probate, and is not attended to, then the original will of personality so authenticated will be evidence.⁴ The probate of a will devising real property is not evidence of the contents of a will as to such property,⁵ even when the original will is lost, (except, indeed, as a mere copy), the Court having no power to authenticate such a devise, as far as it relates to land⁶

The best proof of a will of real estate, is the original will itself. If it relate only to personal estates, the probate will be evidence;⁷ and it is in practice admitted as evidence of wills of real estates in abstracts of title. If the original will has been lost, the register-book or ledger-book in which the will is set out at length, would be good evidence of its contents.⁸

An exemplification of a will under the great seal, is not evidence for a jury in an ejectment;⁹ but where a will remains in Chancery by order of the court, a copy may be given in evidence, for then it becomes a roll of the court.¹⁰

A will thirty years old proves itself, if the possession has gone under it; and sometimes without the possession having gone under it, if the signing be sufficiently recorded; but if the signing were

1 *Allen v. Dundas*, 3 T. R. 251.

2 *Coe v. Westernham*, 2 Selw. N. P. 303, 8th ed. *Pinney v. Pinney*, 3 B. & C. 335.

3 *Rex v. Barnes*, 1 Stark 243.

4 *Gorton v. Dyson*, 1 Br. & Bing. 219, S. C. 3 Moo. 568; 1 Gow. 78.

5 *Bull. N. P.* 245; *Hume v. Rundell*, 6 Mad. & Geld. 331.

6 *Nettar v. Brett*, 2 Roll. Abr. 673, *Bull. N. P.* 246. *Doe d. Ash v. Calvert*, 2 Camp. 330. *Hoe v. Nathorp*, 1 Lord Raym. 154, 732; *St. Leger v. Adams*, ib. 731; 1 *Phil. Ev.* 344, 397.

7 *Bull. N. P.* 246; 1 Lord Raym. 732.

8 *St. Ledger v. Adams*, 1 Lord Raym. 731; *Skinner*, 174; *Anon.* 12 Mod. 375, *Bull. N. P.* 246.

9 *Comb.* 46.

10 *Gibb. Law of Evid.* 271.

not sufficiently recorded, it was a question whether the age sufficiently proved its validity.¹ It has lately, however, been distinctly decided, that a will thirty years old proves itself in all cases; the thirty years being reckoned from the date of the will, and not from the death of the testator.² A marksman is a sufficient witness to a will within the Statute of Frauds.³

If a will of real estate is to be proved against the heir, the general rule of equity is, that all the witnesses to it must be examined,⁴ except where a witness is dead,⁵ insane,⁶ not to be found, or abroad,⁷ or perhaps where the will is not wholly but only partially in question,⁸ or where all the witnesses falsely deny their attestation,⁹ or the attestation is admitted by the heir-at-law.¹⁰ But in all these cases, however, except the last, the handwriting of the witness must be proved. And where the testator had been dead for twenty-five years, and two of the attesting witnesses proved the execution of the will, and the handwriting of the third attesting witness, and that witness was described as a servant of A., and upon inquiries being made of a nephew of A., who had succeeded to the property of that gentleman, the answer was, that nothing had been heard of the witness for a great number of years, but no inquiry had been made of the family of the witness, as it was not known who his relations were; it was held that the proof was sufficient, and the will was declared to be well proved.¹¹ And in the late case of *Tatham v. Wright*,¹² where on an issue directed by the Court of Chancery, only two witnesses were called, the will was held well proved.

2. *Registration*.—It has been held in this Province that in case of a registered title, a vendor cannot make out a good title unless all the deeds are registered.¹³

1 Per Lord Eldon, *Lord Ranelagh v. Lady Parkins*, 6 Dow. 202; see *Doe d. Wildgoose v. Pearce*, 2 M. & R. 240.

2 *Doe d. Oldham v. Wolley*, 8 B. & C. 22. *Oldwell v. Deakin*, 2 Man. & Ry. 192. *Holton v. Lloyd* 1 Molloy, 30.

3 *Wright v. Wright*, 7 Bing. 458; *Addy v. Griz*, 8 Ves. 185, 534.

4 *Bootle v. Blundell*, 19 Ves. 505; Cooper, 136, S. C., overruling a dictum of Lord Thurlow in *Powel v. Cleaver*, 2 B. C. C. 503.

5 *Bootle v. Blundell*, 19 Ves. 606.

6 *Bennett v. Taylor*, 9 Ves. 331.

7 *Billing v. Brookebank*, cited by Lord Eldon, 19 Ves. 505; *Stedmore v. Padmore*, 2 Dick. 589; *Lord Carrington v. Payne*, 5 Ves. 404.

8 Per Lord Eldon, 19 Ves. 505.

9 Ibid. 507.

10 *Aynsly v. Reed*, 1 Dick. 249.

11 *James v. Parnell*, 1 Turn. & Ross. 417.

12 2 Russ. & M. 1.

13 *Kitchen v. Murray*, 16 C. P. U. C. 69; *Brady v. Walls*, 17 Grant, 708.

The certificate of the Registrar, or his Deputy, endorsed upon a deed, is *prima facie* evidence of registration.¹ It is, however, only *prima facie* evidence, and does not prevent a party from showing that there was no actual registry of the deed, or that the registration is void for non-compliance with the formalities required by the Statute.

In *Doe d. McLean v. Manahan*,² the late C. J. Robinson, speaking of the 35th Geo. III., c. 5, said, the statute "makes such certificate *prima facie* evidence only of the registry with a view merely to sufficiency and facility of proof in the first instance; but such certificate is not to be taken as incontrovertible evidence of the fact so as to exclude all proof to the contrary. If it were to be taken as incontrovertible evidence, then all people would hold their estates at the mercy of a Registrar, who could give effect to deeds at his pleasure by giving false certificates of registry never made." And Hagerman, J. said, the certificate of registry "may be rebutted by evidence of facts showing it to be fraudulent and void."

In *Robson v. Waddell*,³ Draper, C. J. said, "It might be argued that a memorial of this prior deed was in fact entered in the registry book, and that the registration of the deed was certified on the back thereof by the Registrar, and that both these acts were completed before the execution of the subsequent mortgage, but the answer is, that such a memorial as by the act is directed has never been entered, and therefore the certificate of the Registrar wants the necessary foundation, and though the statute makes the certificate of the Registrar evidence of registration in all Courts of Record, it is not made conclusive, so that parties interested cannot go behind it and shew that the statute has not been complied with."

The importance of searching the registry office carefully, and seeing that the requirements of the act have been complied with, will be apparent, when it is remembered that defective registration is not notice,⁴ and also because in the case of a registered title a vendor cannot make a good title unless all the deeds are registered.

¹ 35 Geo. III. ch. 5, sec. 13; 9 Vic. ch. 34, sec. 9; Con. Stat. U. C. ch. 89, 29 Vic. ch. 24, sec. 31; Ont. Stat. 31 Vic. ch. 20, sec. 58.

² 1 Q. B. U. C. 491, 498.

³ 24 Q. B. U. C. 58.

⁴ *Boucher v. Smith*, 9 Grant, 347; *Reid v. Whitehead*, 10 Grant, 446.

It is true that by the recent Registry Acts, many defects in past registrations, which might otherwise have been raised as objections, are cured; the statute¹ declaring, that "no registration of any deed or instrument heretofore made shall be deemed or adjudged void by reason of the name or names, residence or residences, addition or additions, of the witness or witnesses to such deed or instrument being improperly given or described in the registered memorial thereof, or being in part or altogether omitted from such memorial, or by reason of any clerical error or omission of a formal or technical character therein."

The first Registry Act² was passed at an early period in the history of the Province. The object of the Legislature in establishing a system of registration, was to enable any one dealing with property from time to time, to know whether it was affected by any existing deed or conveyance, and to compel the registration of so much of such deed or conveyance as would afford this knowledge, on the penalty in default thereof of its being held void.³

By the original act registration was not made imperative; but it was enacted,⁴—"That from and after the confirmation of all or any lands to any person or persons by grant from the Crown, under the seal of the Province, a memorial of all deeds and conveyances which shall be made and executed, and of all wills and devises in writing made, or to be made, and published when the deviser or testator shall die, after making and publishing of the same, of or concerning, and whereby any lands, tenements or hereditaments in any County or Riding of this Province may be anywise affected in law or equity, may, at the election of the party or parties concerned, be registered; and that every deed and conveyance that shall at any time after any memorial is so registered, be made and executed of the lands, tenements or hereditaments, or any part thereof, comprised or contained in any such memorial, shall be adjudged fraudulent and void as against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the

1 29 Vic. ch. 26, sec. 78; Ont. Stat. 31 Vic. ch. 20, sec. 80.

2 35 Geo. III. ch. 5.

3 *Reid v. Whitehead*, 10 Grant, 452.

4 35 Geo. III. ch. 5, sec. 2.

deed or conveyance under which such subsequent purchaser or mortgagee shall claim, and that every devise by will of the lands, tenements or hereditaments, or any part thereof, mentioned or contained in any memorial as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as hereinafter directed."

By an act¹ passed two years later, after reciting that lands had been intended to be conveyed by deeds of bargain and sale, and that such deeds not having been enrolled in any Court of Record were invalid, it was enacted,—“That wherever any lands have been sold, or shall hereafter be sold under deed of bargain and sale, and such deed of bargain and sale hath been, or shall hereafter be duly enregistered in the Registry Office of the County in which such lands are situate, agreeably to the provisions of the Act 35 Geo. III., c. 5, the same shall be, and is hereby declared to be, a good and valid conveyance in law.”

Subsequently, it was enacted by the 4 Wm. IV., c. 1, sec. 47—“That after the passing of this act a deed of bargain and sale in this Province shall not be held to require enrolment or to require registration to supply the place of enrolment for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold, provided always that the necessity of registering any such deed of bargain and sale in the registry of the County in which the land is situate, in order to guard against a subsequent purchaser of the same lands, obtaining title by prior registry shall continue as before the passing of this act.”

In 1846, all the then existing statutes as to registration were repealed, and an act passed,² consolidating and amending the Registry laws.

By that act,³ the 2nd section of the 35 Geo. III., c. 5, was re enacted *in todidem verbis*: and it was further provided,⁴ that wills

¹ 37 Geo. III. ch. 8.

² 9 Vic. ch. 34.

³ Sec. 6.

⁴ Sec. 12.

or the probate thereof, should be recorded within the space of twelve months after the death of the testator, and it was declared that such registration "shall be as valid and effectual against subsequent purchasers, as if the same had been recorded immediately after the death of such respective deviser, testator or testatrix; anything herein contained to the contrary thereof in anywise notwithstanding: provided always, that in case the devisee or person or persons interested in the lands, tenements or hereditaments, devised in any such will as aforesaid, by reason of the contesting such will, or by any other inevitable difficulty, without his, her or their wilful neglect or default, shall be disabled from the recording the same within the respective times hereinbefore limited, then and in such case the recording the same within the space of twelve months next after his, her or their attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient recording within the meaning of this Act; anything herein contained to the contrary hereof notwithstanding."

A further alteration and amendment of the Registry Law took place in 1850, and in the act,¹ then passed, the option given as to registering deeds was taken away, and it was enacted,²—"That after any grant from the Crown of any lands in Upper Canada, and deed patent thereof issued, every deed, devise or other conveyance which shall be executed at any time after the first day of January, 1851, whereby any lands, tenements or hereditaments in Upper Canada may be in any wise affected in Law or Equity, shall be adjudged fraudulent and void, not only against any subsequent purchaser or mortgagee for valuable consideration, but also against a subsequent judgment creditor who shall have registered a certificate of his judgment, unless such memorial be registered as by the said first recited act,³ is specified before the registering of the memorial of the deed, devise or conveyance, or the certificate of the judgment under which such subsequent purchaser, mortgagee, or judgment creditor respectively shall claim, subject, nevertheless, as to devisees, to the provisions contained in the 12th section thereof; provided always, that nothing herein contained shall be construed to affect the right

¹ 13 & 14 Vic. ch. 62.

² Sec. 3.

³ 9 Vic. ch. 34.

of equitable mortgagees as now recognized by the Court of Chancery in this Province."

By the next section,¹ after reciting that the doctrine of tacking had been found productive of injustice, and required correction, it was enacted, that deeds should take priority according to registration, and if not registered, according to the time of execution. And by the 8th section, it was provided,—“that the registry of any deed, conveyance, will or judgment under the first recited act,² or this act, affecting any lands or tenements, shall in equity constitute notice of such deed, conveyance, will or judgment, to all persons claiming any interest in such lands or tenements subsequent to such registry."

The 16th Vic. c. 187, made provision,³ that whenever, after the passing of the Act, a deed should be executed under a power of attorney from the grantor, a memorial of the power might be registered in the same manner and upon the same evidence as the memorial of a deed.

In 1855, statutory provision was made⁴ for the registration of decrees of foreclosure, and other decrees in Chancery, affecting any title or interest in land, and it was also enacted that the filing of a bill or taking any proceeding in the Court of Chancery in which any title or interest in land might be brought in question should not be deemed notice of such bill or proceeding, to any person not a party thereto, "unless⁵ and until a certificate shall be given by the Registrar of the Court of Chancery, and registered in the Registry Office of the County or Union of Counties in which the lands are situate, the title or interest in which is questioned in such bill or proceeding."

Upon the consolidation of the Statutes taking place in 1859, the various enactments above referred to, from the 9th Vic. c. 34, were embodied in one act,⁶ with only a few slight verbal alterations, and the law as to the registration continued in the same shape, except

¹ Sec. 4.

² 9 Vic. ch. 34.

³ Sec. 7.

⁴ 18 Vic. ch. 127, sec. 4.

⁵ *Ibid.* sec. 8.

⁶ Con. Stat. U. C. ch. 89.

as to the registration of judgments, which was abolished in 1861,¹ until the year 1865, when the 29 Vic. c. 24 was passed.

In the first Session of the Legislature of Ontario, an act² was passed, "respecting Registrars, Registry Offices, and the registration of Instruments affecting land in the Province of Ontario," by the second section of which, all Acts inconsistent therewith were repealed.

The provisions of these two Acts, as to the mode of registration, and the effect of registering, or omitting to register, are exactly the same, and are as follows :—

"After any grant from the Crown of lands in Ontario, and Letters Patent issued therefor, every instrument affecting the lands or any part thereof comprised in such grant, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such instrument is registered in the manner herein directed before the registering of the instrument under which subsequent purchaser or mortgagee may claim."³

"All wills or the probates thereof, registered within the space of twelve months next after the death of the devisor, testator, or testatrix, shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had been registered immediately after such death; and in case the devisee or person interested in the lands devised in any such will, is disabled from registering the same within the said time by reason of the contesting of such will or by any other inevitable difficulty without his or her wilful neglect, or default, then the registration of the same within the space of twelve months next after his or her attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of this act."⁴

"The registry of any instrument, under this Act, or any former act, shall in equity constitute notice of such instrument, to all persons claiming any interest in such lands subsequent to such registry."⁵

¹ 24 Vic. ch. 41.

² Ont. Stat. 31 Vic. ch. 20.

³ 29 Vic. ch. 24, sec. 62; Ont. Stat. 31 Vic. ch. 20, sec. 64.

⁴ 29 Vic. ch. 24, sec. 63; Ont. Stat. 31 Vic. ch. 20, sec. 65.

⁵ 29 Vic. ch. 24, sec. 64; Ont. Stat. 31 Vic. ch. 20, sec. 66.

"Priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under the prior registration."¹

"No equitable lien, charge, or interest, affecting land shall be deemed valid in any Court in this Province after this act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act."²

Before patent from the Crown, the only instruments which can be registered in the County Registry Office, are those which create a mortgage lien or incumbrance upon the land.³ The registration of these instruments is effected under the Consolidated Statutes of Upper Canada, ch. 80, s. 24.

Since the 18th September, 1865,⁴ grants from the Crown are registered by producing the original to the Registrar, and filing with him a true copy sworn to by any person who has compared it with the original. All other instruments except wills, are registered by the deposit of the original instrument, or by the deposit of a duplicate.

Wills⁵ are to be registered at full length by the production of the original will and the deposit of a copy, with an affidavit sworn to by one of the witnesses to the will proving the due execution thereof by the testator, or by production of probate, or letters of administration with the will annexed, under the seal of any Court in this Province, or in Great Britain or Ireland, or in any British Province, Colony or Possession, having jurisdiction therein; and by the deposit of a copy of such probate or letters of administration, with an affidavit verifying such copy.

Prior to 1846, all that was required for registration was that the memorial should be in writing, and in the case of deeds, under the hand and seal of the grantor, or of one of the grantors if more than one, or of some or one of the grantees, his or their heirs, executors

1 29 Vic. ch. 24, sec. 65; Ont. Stat. 31 Vic. ch. 70, sec. 67.

2 29 Vic. ch. 24, sec. 66; Ont. Stat. 31 Vic. ch. 20, sec. 68.

3 *Holland v. Moore*, 12 Grant, 296.

4 29 Vic. ch. 24, sec. 35; Ont. Stat. 31 Vic. ch. 20, sec. 34.

5 29 Vic. ch. 24, sec. 36; Ont. Stat. 31 Vic. ch. 20, sec. 35.

or administrators, guardians or trustees, attested by two witnesses, one of whom was one of the witnesses to the execution of the deed, and who was required to prove upon his oath the due execution of the deed or conveyance, and of the memorial.¹ Wills were registered, upon a production of a memorial, under the hand and seal of some or one of the devisees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, by one of whom the due execution of the memorial was proved upon oath.

The statute² required the memorial to contain the day of the month and the year when such deed, conveyance or will bore date, and the names and additions of all the parties to such deed, conveyance or will, or the deviser or testatrix of such will, and of all the witnesses to such deed, will or conveyance, and the places of their abode, and to express or mention the lands, tenements or hereditaments contained in such deed, will or conveyance, and the names of all the Townships or Parishes within the said County or Counties, Riding or Ridings, where any such lands, tenements, hereditament or hereditaments are lying or being that are given granted, conveyed, devised or any way affected or charged by any such deed, will or conveyance, in such manner as the same are expressed or mentioned in such deed, will or conveyance, or to the same effect.

By the 9 Vic., c. 34,³ a further requisite was introduced, viz: that the witness who proved the execution of the deed, conveyance or will, should also depose "to the place where the same was executed;" and this is still an essential requisite in the affidavit of the attesting witness.⁴

To a perfect registration it is essential, that all the requirements of the act should be complied with.

In *Robson v. Waddell*,⁵ the objection being taken, that in the memorial the addition of the witness to the deed was not given, though his name and place of abode were stated, Draper, C. J., in delivering the judgment of the Court said, "among the directions of

1 35 Geo. III. ch. 5, sec. 4.

2 35 Geo. III. ch. 5, sec. 5; Con. Stat. U. C. ch. 89, sec. 19.

3 Con. Stat. U. C. ch. 89, sec. 23.

4 29 Vic. ch. 24, sec. 39; Ont. Stat. 31 Vic. ch. 20, sec. 38.

5 24 Q. B. U. C. 574.

this act is one, that every memorial shall contain the names and additions of the witnesses to the deed and the places of their abode. It is enough to insert the names and additions of the parties to the deed, in the same manner or words as they are set forth therein ; but with regard to the subscribing witnesses, their names and additions, and places of abode (though the two latter are rarely if ever in this country mentioned in the attestation) must be set forth in the memorial. The place of abode of a witness, when, as in the present case, his identity was established on his own oath at the trial, may be deemed unimportant ; but it is one of the things which the statute requires, and the Courts neither can nor should endeavour to dispense with it, though in this particular instance, and even generally, they may think it of little value.

“ We may think the objection to be strictly literal and technical, and may regret an omission such as has been made, which has not, and scarcely could under all the circumstances have operated to the prejudice of the subsequent mortgagee : that in fact it may have been rather to a search after objections, than for notice or information that the discovery of this defect is owing ; but we cannot see in all this a sufficient reason for disregarding the language of the act. Our judgment therefore must be founded upon the statute. We are bound to hold that this non-compliance with one of its express requirements makes the prior deed fraudulent and void as against the subsequent mortgagee.”

In another case,¹ where the objection was, that in the memorial the place of abode of the witness was given as, “ of London,” although the objection was overruled, the description being held a sufficient compliance with the act, Esten, V. C., said, “ It is undoubtedly essential that the requirements of the Registry Acts should be strictly observed, and any material failure in that respect will vitiate the registration.”

The description of the parties as, “ of the City of London,” without adding “ in the Province of Canada,” was in the same case, held sufficient.

¹ *Reid v. Whitehead*, 10 Grant, 448.

To the affidavit of execution two objections seem to have been taken, the one, that the witness merely stated therein, that he had "seen the due execution of the deed;" the other, that the place of execution was not mentioned. With reference to these objections V. C. Esten said, "If the matter had been *res integra* I should be strongly disposed to think that it was not sufficient for the affidavit to state that the witness had 'seen the due execution of the deed;' I should have thought that it should describe the act performed, as in an ordinary affidavit of execution, so as to enable the Registrar to judge of its sufficiency. But in this respect the affidavit follows the form prescribed by the act of Parliament—it is probably a form commonly used—the affidavit is not the act of the party but of a witness, and it is a matter transacted between the witness and the Registrar, not intended for the information of the public, but for the satisfaction of the Registrar. It would be perhaps not too much to hold that all the provisions respecting the proof are directory. The mention of the place of execution is, I think, intended to enable the Registrar to judge of the nature of the proof required in that particular case, and which is different according as the instrument is executed in, or out of Upper Canada. The Legislature have not thought it of sufficient importance to require it to be stated in the memorial, although it might afford some clue to the discovery of the instrument, or the detection of any fraud connected with it. I do not think that any defects in the affidavits in this case affect the validity of the registration to which they relate."

Where the deed was registered upon a memorial executed by the grantee, it was held necessary in order to valid registration, that one of the witnesses to the memorial, should also be one of the witnesses to the execution of the deed by the grantor.¹

It is no objection to the affidavit of execution, that it was taken by one of the subscribing witnesses before the other.² Whether an affidavit sworn before one of the parties to the instrument would prior to the 18th September, 1865, be objectionable, is undetermined; but since that date it would, the statute³ saying, "none of the persons authorized to take affidavits by this act shall take any affida-

¹ *Jack d. Rennick v. Armstrong*, 1 Hud. & Brooke, 727.

² *Roid v. Whitehead*, 10 Grant, 450.

³ 29 Vic. ch. 24, sec. 45; Ont. Stat. 31 Vic. ch. 20, sec. 44.

vit of the execution of any instrument in case he is a party to such instrument."

For the registration of a will, it is now essential, where the original will is produced to the Registrar, that the witness making the affidavit should swear to its execution by the testator;¹ but prior to these statutes, proof of execution by the testator was required only in the case of wills executed out of Upper Canada.

As to the certainty of description of the land intended to be conveyed, in the case of *Reid v. Whitehead*, already quoted from, where it was objected that the description in the memorial did not sufficiently identify the premises, and the Court held that it did not, the Chancellor, after quoting the section of the statute which declares what a memorial is to contain, said, "I take these words to mean that the description of the lands, as contained in the instrument, or such description as shall identify or make them known as fully as that description itself, shall be contained in the memorial."

"Now, what are the facts here? The instrument sought to be registered purposed to assign a part of lot 10, in the City of London, as described in a certain indenture of mortgage thereto attached, and which was not on the registry books. The memorial uses precisely the same words, but without showing what were the lands described in the deed referred to. The assignment and the deed taken together show the lands, and for this purpose they become incorporated and form one instrument; but the assignment by itself, or the memorial by itself, would not show what lands were assigned, or were affected by the deed assigned; and the memorial, therefore, has not done its work. It does not mention the land contained in the instrument sought to be registered, for that instrument adopts and incorporates, by reference to another deed, where the description is to be found, and the memorial in order to describe the lands truly, should have gone to that instrument to which it referred, and taken from it the description, stating that it had been so taken," and the Court on this ground held the registration void.

On appeal, however, the decree of the Court of Chancery was reversed.²

¹ 29 Vic. ch. 24, sec. 36; Ont. Stat. 31 Vic. ch. 20, sec. 35.

² 2 E. & A. Rep. 582.

In delivering the judgment of the Court of Error and Appeal, VanKoughnet, C., said, "Three questions did not sufficiently engage attention there (*i. e.*, in the Court below). The first is, whether or not the assignment of the mortgage was in itself a conveyance capable of passing the interest which the mortgagee took under the mortgage in the land conveyed by it. I cannot say it was not. A reference in one deed to a description of land appearing in some other deed or paper, may be rendered sufficiently certain on the production of the latter. If this cannot be produced the grantee may be unable to make out his title, but this is a risk more or less common to all documents. A party desiring to deal with any portion of the land which may be affected by a description so given, must, I suppose, satisfy himself by inquiring what that description does cover, or he will run the risk of it; as on the other hand the owner of the land may find difficulty in disposing of his property when the description which he gives in a deed relating to a portion of it is not patent or easily ascertained. The second question is, whether the deed being operative, a registration of it by a memorial following the language of the deed is sufficient. I think we must say that it is."

Care should be taken to see that the affidavit of execution is sworn before a person qualified to administer the oath.

Before 1818, there seems to have been no provision for proving the execution of deeds executed out of Upper Canada. The act¹ provided only for proof of execution being made, by an oath before the Registrar, or his Deputy, or by affidavit sworn before one of the Judges of the Court of King's Bench, or before a Commissioner authorized to take affidavits in that Court.

An act² passed in 1818, provided for proof of the execution of deeds in Great Britain and Ireland, or in any Colony belonging to the Crown of Great Britain, being given by affidavit sworn before the Mayor or Chief Magistrate of any City, Borough, or Town Corporate in Great Britain or Ireland, or before the Chief Justice or Judge of the Supreme Court of any colony. Another section³ of the same act, allowed the execution of deeds to be proved before the

¹ 35 Geo. III. ch. 5, sec. 4-13.

² 58 Geo. III. ch. 8.

³ Sec. 3.

Justices in Quarter Sessions assembled, in cases where the witnesses were dead.

The 9 Vic., c. 34, made further provision for the proof of deeds executed abroad, by affidavit, sworn in Lower Canada, before the Chief Justice or Judge of any Court of Queen's Bench, and before the Mayor of any City, Borough or Town Corporate in any foreign country, or before any Consul or Vice-Consul of Her Majesty, resident therein.

By the 12 Vic., c. 77, the Chief Justice and Judges of the Court of Queen's Bench were empowered to appoint Commissioners in Lower Canada for taking affidavits in any Court of Law of Record in Upper Canada, and the act¹ made affidavits of the execution of deed sworn before such Commissioners, sufficient evidence upon which to register the memorial.

In addition to the persons specified above as qualified to take affidavits for registration purposes, affidavits of execution may now² be sworn, in Great Britain or Ireland, before a Judge of any of the Superior Courts of Law or Equity; or the Judge of any County Court; or before a Commissioner appointed for taking affidavits in the Canadian Courts,³ or a Commissioner appointed by the Lord Chancellor to administer oaths in Chancery in England;⁴ or before a Notary Public, certified under his hand and official seal.⁵

In Lower Canada, before a Judge or Prothonotary of the Superior Court, or Clerk of the Circuit Court.⁶

If executed in any British Colony or possession, the affidavit may now be also sworn, before any Judge of a Court of Record; or before any Notary Public; and in the British possession in India, before any Magistrate or Collector, certified under the hand of the Governor to be such; and in foreign countries before any Judge of a Court of Record.

¹ Sec. 2.

² 29 Vic. ch. 24, sec. 42; Ont. Stat. 31 Vic. ch. 20, sec. 41.

³ 26 Vic. ch. 41, secs. 3-5. This act has been repealed, except as to Commissions already issued, by Ont. Stat. 34 Vic. ch. 14, sec. 1. The Ont. Stat. re-enacts the original Act, only substituting "Lieutenant-Governor" for "Governor," and "Ontario" for "Canada."

⁴ Ibid.

⁵ Ibid.

⁶ 29 Vic. ch. 34, sec. 42; Ont. Stat. 31 Vic. ch. 20, sec. 41.

It would seem to be necessary, that the person before whom the affidavit is sworn, should add to his signature the addition "Commissioner," or other designation, showing the character in which the affidavit was taken before him.¹

Purchasers are now, however, protected from danger in consequence of many slips and errors which would, until recently, have vitiated the registration, by the provisions of the recent Registry Acts,² that no past registration is to be void, "by reason of any clerical error or omission of a formal or technical character."

6. *Acts of Parliament*.—Acts of Parliament are records, and relate either to the country at large, when they are called general acts, or only to particular classes of men, or to certain individuals, in which cases they are called private acts.³

In some acts of parliament not relating to the country at large, a special clause is inserted, declaring them to be public acts. Such acts are considered in every respect as public acts.⁴

Most private acts of Parliament in this Province contain a clause declaring that they shall be deemed public acts, and be judicially noticed without being specially pleaded; and that a copy printed, or purporting to be printed by the Queen's Printer shall be received as evidence.

The clause declaring the act to be a public act, does not render a copy of the act good evidence except as between the parties; against strangers it is inadmissible.⁵ Lord Tenterden, in the case cited, held that the clause only applied to the form of pleading, and did not vary the general nature and operation of the act.

Where there is a clause declaring a copy of the act printed by the Queen's Printer to be evidence, the production of a copy purporting to be so printed is sufficient;⁶ but if the act contains no such clause then, it must be proved by a copy examined with the original.⁷

1 *Babcock v. Municipal Council of Bedford*, 8 C. P. U. C. 527.

2 29 Vic. ch. 24, sec. 78; Ont. Stat. 31 Vic. ch. 20, sec. 80.

3 *Gibb. Ev.* 39, 40; 1 *Phill. Ev.* 317.

4 1 *Phill. Ev.* 383.

5 *Drett v. Beales*, 1 Mood. & M. 425.

6 *Dart on Vendors*, 287; 1 *Byth.* 160.

7 *Coe. Con. Ev.* 81; *Dart on Vendors*, 287; *Lee on Abn.* 321.

By the interpretation acts both of the Dominion of Canada,¹ and Province of Ontario,² "Every act, shall, unless by express provision it is declared to be a private act, be deemed to be a public act, and shall be judicially noticed by all Judges, Justices of the Peace, and others, without being specially pleaded—and all copies of acts, public or private, printed by the Queen's Printer shall be evidence of such acts and of their contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed."

A public act of Parliament is notice to all mankind, but a private act, or a private act made public, is not of itself notice to a purchaser.³ The only object of the proviso for making it a public act being, that it may be judicially taken notice of without being specially pleaded, and to save the expense of proving it by an attested copy.⁴

Where a sale is made in pursuance of an act of Parliament, the provision of the act must be followed strictly; the exercise of powers conferred by an act of Parliament receiving like the exercise of other powers a strict construction, consequently the evidence necessary to show that all the forms have been complied with, becomes a necessary part of the title.⁵ But if a Court having jurisdiction, improperly decides, in carrying into effect a special act of Parliament, as to debts or claims on the estate, such errors will not affect a purchaser.⁶

Recitals in private acts require the same authentication as averments in ordinary deeds, the act itself being nothing more than a private assurance.⁷

Records and Proceedings in Chancery.—A record is conclusive proof that the decision or judgment of the court was as is there stated, and evidence to contradict it will not be admitted.⁸ Records are preserved in public repositories, and examined copies thereof are admitted as the best producible evidence;⁹ but copies of such

1 31 Vic. ch. 1 sec. 7, subsec. 38.

2 Ont. Stat. 31 Vic. ch. 1, sec. 7, subsec. 38.

3 *Sug. V. & P.* 758; *Dart on Vendors*, 789; and see *Barraud v. Archer*, 2 Sim. 433; 2 Russ. and M. 751.

4 *Hops v. Stevenson*, 3 Bos. & P. 578.

5 *Sug. V. & P.* 111; *Atkinson on Titles*, 558.

6 *Sug. V. & P.* 111, 112.

7 *Co. Con. Ev.* 81.

8 *Co. Litt.* 362 b.; 1 *Phill. Ev.* 317; see *Rogers v. Wood*, 2 B. & Ad. 245.

9 *Leighton v. Leighton*, 1 Str. 210; 1 *Phill. Ev.* 383.

copies are inadmissible unless the originals be destroyed.¹ But it is essential to the admissibility of such copies, that they be made by the proper officer.²

Decrees.—Where a decree of the Court of Chancery forms a link in the chain of title, it is the duty of the purchaser's solicitor to look through the whole of the decrees and other proceedings in Chancery to ascertain that nothing contained in them will affect his title.³

A purchaser will not be protected by a decree obtained in an imperfect suit, such a decree not being binding as to persons not parties to the suit, and whose rights are affected by it.⁴ A party purchasing under a decree of the Court is bound to see that the sale is made according to the decree;⁵ and all the proceedings in the cause ought to be produced and inspected by the purchaser.⁶ The Court, though it may direct the sale of the property, never undertakes to warrant the title, and it is quite possible for a purchaser to be evicted, although the sale is made by an order of the Court, and although the title has passed through the Master's Office.⁷

The only mode in which a purchaser can obtain a more perfect title on a sale under a decree, than under an ordinary contract for purchase, is by obtaining a deed from the Court under the act for Quieting Titles.⁸

If a purchaser takes a title to an estate sold under a decree, but not in conformity with the provisions of the decree, he will not be protected by it,⁹ sales under decrees being entitled to protection when they are conformable to the decree, not otherwise.¹⁰

Mere irregularities in a decree are not, however, sufficient grounds for impeaching a sale made under it.

In *Bennet v. Hamill*,¹¹ Lord Redesdale said, "The purchaser has a right to presume that the Court has taken the steps necessary to

1 *Green v. Proude*, 1 Mod. 117, *Prios v. Torrington*, Salk. 285.

2 *Bull N. P.* 220.

3 *Lee* on Abs. 317.

4 *Colclough v. Sternum*, 3 Bligh, 186; *Giffard v. Hart*, 1 Sch. & Lef. 386.

5 *Atkinson* on Titles, 660.

6 *Lee* on Abs. 176.

7 *Lee* on Abs. 176.

8 20 Vic. ch. 25, sec. 32.

9 *Colclough v. Sternum*, 3 Bligh, 180.

10 *Atkinson* on Titles, 561.

11 2 Sch. & Lef. 577; and see *Campbell v. Royal Canadian Bank*, 19 Grant, 234.

investigate the rights of the parties ; and that it has on the investigation properly decreed a sale ; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court, and he has further to see that taking the conveyance he takes a title that cannot be impeached aliunde. He has no right to call upon the court to protect him from a title not in issue in the cause, and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title although the decree may be erroneous, and, therefore, ought to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the Court which would be highly mischievous."

In *Dickey v. Heron*,¹ where a motion was made by the defendant to open biddings or set aside a sale, on the grounds that the report of the amount due by the defendant was not filed until after the day appointed for payment, and that the sale under the decree had not in fact been advertised as directed by the Master although stated in the report on sale to have been so, it was held that the first objection had been waived by delay and that the second did not affect the purchasers, Spragge, V.C., saying, "I think a stranger purchasing is not affected by proceedings in the suit further than this, that he must see that there is a decree or order authorizing the sale that is made."

In another case² where a bill was filed to impeach a sale made under a decree, Lord St. Leonards said, "If I found a purchaser buying, where fraud appeared clearly on the face of the decree, I should hold him to have notice of it ; but I should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud, which was not discovered by the Court, or the officers of the Court, or the counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted by the facts of the case."

Where the title is derived, not under a decree for sale, but under a decree and final order of foreclosure, the same rule seems to apply.

¹ 1 Chan. Cham. R. 149.

² *Bowen v. Evans*, 1 J. & L. 267.

In the case of *Gunn v. Doble*,¹ where a bill was filed by a mortgager against a purchaser from the mortgagee after a final order of foreclosure, several objections were taken to the regularity of the proceedings in the foreclosure suit. It was objected among other things, that in the bill and all the subsequent proceedings the plaintiff was improperly named as "Annie Louisa Rail," her proper name being "Annie Louisa Rait;" that a person to whom the defendant conveyed *pendente lite* should have been made a party; and that the report finding the amount due and appointing a day for payment, though dated on the 18th of March, was not in fact signed until the 18th of April. All the objections raised were overruled by Spragge, V.C., although the learned Vice-Chancellor expressed his disapprobation of the ante-dating of the report, remarking, "If the question were between the original parties, it would be at least doubtful if the mortgagee could have held her final order of foreclosure; the question is, whether Doble purchasing under the circumstances that he did, can be affected by the irregularity."

After commenting upon the authorities (all of which have been already quoted) the learned Vice-Chancellor said, "The observations of the learned Judges, whose language I have quoted, occurred in cases of sales under decrees; but I apprehend that they did not mean to hold purchasers under decrees not bound to look at the proceedings before decree, merely on the ground that to require more would have a tendency to damp the sales of the Court; in other words, that it would not be expedient to require more; but that, while pointing out the injurious effect that the requiring more would have upon sales, they held as a matter of principle, that parties acquiring rights under decrees, not being themselves parties to the suit, could not be held bound to see whether the proceedings by which the decree was arrived at were correct and regular; including in the word decree any decretal or other order by which the rights of the parties were disposed of; and which would comprehend a final order of foreclosure, and, as the form is in Ireland, of foreclosure and sale. If a purchaser at a sale by the Court 'has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has on that investi-

gation properly decreed a sale,' it does appear to me, upon principle, that a purchaser from a party in whose favor the Court has decreed final foreclosure has the like right to presume that the Court has taken the like steps, and has upon investigation properly decreed final foreclosure. Again, to refer to the language of Lord St. Leonards, while there would be no wrong in holding a purchaser bound by what appears upon the face of a decree or other order which may be said to constitute a link in his chain of title, it would be quite another thing to hold him bound to look into that which was not discovered by the Court; which the Court had passed as correct and regular, and upon which the Court had founded its decree or order."

A decree of foreclosure against an infant defendant should give the infant a day to show cause after attaining twenty-one;¹ and if followed by a final order, the order must also reserve a day to show cause. But where the decree was made against the ancestor of the infant in his lifetime, and the suit is afterwards revived against the infant, no reservation by the final order of a day to show cause is necessary.²

Until notice of the decree is served upon the infant, after he attains twenty-one, the decree is not absolute; the only cause, however, which the infant can show, is error in the decree.

In cases where, on account of the defendant not having been served personally with the bill, the decree is not absolute for three years,³ it does not become absolute by effluxion of time merely, an order making it absolute must be obtained from the Court.

In suits for partition or sale, the decree of the Court is "as⁴ effectual for the apportionment or conveying away of the estate or interest of any married woman, infant, or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself," and no day to show cause need be reserved.

¹ *Mair v. Kerr*, 2 Grant, 223.

² *Sutherland v. Dickson*, 2 Chan. Cham. 25.

³ Chan. Con. Ord 113, 114, 115, 116; *Taylor's* Chan. Ord. 179, 180, 181.

⁴ Con. Stat. U. C. ch. 12, sec. 47.

Vesting Orders.—In every case in which the Court of Chancery has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may, instead of ordering the execution of a conveyance, “make¹ an order vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer, if executed; and thereupon the order or decree shall have the same effect both at law and in equity as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest to the person in whom the same is so ordered to be vested, or in the case of a chose in action as if such chose in action had been actually assigned to such last mentioned person.

Where a title is derived under a vesting order, the purchaser is entitled to call for evidence that the persons whose interests were intended to be assigned or conveyed by the order, were alive when it was made.²

It is doubtful whether the Court can, under this act, make a valid vesting order transferring the estate of a married woman.

In *Clark v. McGregor*,³ a decree vesting the estate of a married woman was made by Mowat, V. C., but in *Field v. Moore*,⁴ the Master of the Rolls said, “I am not aware of any principle which would enable this Court to bind the real estate of a married woman in any manner except by those formalities which are required by law.”

Under the Imperial Acts 13 & 14 Vic. c. 60, and the 15 & 16 Vic. c. 55, which are in force in this Province,⁵ in the several cases of a lunatic, or person of unsound mind, or infant being seised or possessed of any land upon any trust, or by way of mortgage, or entitled to any contingent right in any lands upon trust or by way of mortgage;

Or, of any person, solely or jointly with any other person or persons seised or possessed of any lands upon any trust or entitled to a

¹ Con. Stat. U. C. ch. 12, sec. 63.

² *Stator v. Ficken*, 1 Chan. Cham. I. MS. 29th April, 1867.

⁴ 19 Beav. 195.

⁵ Con. Stat. U. C. ch. 12, sec. 26, subsec. 10; *Re Lash*, 1 Chan. Cham. 226.

contingent right in any lands upon any trust, being out of the jurisdiction, or not to be found ;

Or, of its being uncertain which of several persons jointly seised or possessed of any lands upon any trust was the survivor ;

Or, (where one or more person or persons shall have been seised or possessed of any lands upon any trust) of its not being known whether the trustee last known to have been seised or possessed be living or dead ;

Or, of any person seised of any lands upon any trust having died intestate as to such lands, without an heir, or having died and its not being known who is his heir or devisee ;

Or, of lands being subject to a contingent right in any unborn person or class of persons, who, upon coming into existence, would, in respect thereof, become seised or possessed of such lands upon any trust ;

Or, of a person jointly or solely seised or possessed of any lands, or entitled to a contingent right therein upon any trust being demanded by a person entitled to require a conveyance, assignment, or release of the same respectively, or his agent, to convey, release or assign the same, but wilfully refusing or neglecting to convey or assign the said lands for the space of twenty-eight days next after such demand ;

The Court of Chancery is enabled to make an order vesting such lands in such person or persons in such manner and for such estate, or releasing the lands subject to such contingent right therefrom, or disposing of the same, as the Court shall direct ; and the order is in itself to operate as an assurance.

And where any mortgagee shall have died without having entered into the possession or into the receipt of the rents and profits of the mortgaged lands, and the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or such last mentioned person shall consent to an order for the reconveyance of such lands, the Court may make an order vesting such lands in such person or persons, in such manner, and for such estate

as the Court shall direct in case an heir or devisee of such mortgagee shall be out of the jurisdiction or cannot be found ;

Or, an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or his agent, have stated in writing that he will not convey the same, or shall not convey the same, for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or his agent ;

Or, it shall be uncertain which of several devisees of such mortgagee was the survivor ;

Or, it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead ;

Or, such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died, and it shall not be known who is the heir or devisee ; and the order is itself to have the effect of an assurance.

Instead of making a vesting or releasing order, the Court may, in every case, appoint a person to make a conveyance, assignment, release or disposition of the lands or contingent interest which, when duly made, is to have the effect of vesting or releasing order.

Under these provisions the Court may vest the legal estate, subject to redemption, in the executor of a deceased mortgagee, or in the administrator of a mortgagee in fee, who has died intestate,¹ whose heir is unknown, the debt remained unpaid,² though at first the opposite was held.

Exemplifications under the seal of a court of justice are next in authenticity to those under the great seal,³ if the court be established by the common or statute law. But exemplifications under the seals of inferior courts of justice will not generally be evidence ;⁴ the

¹ *Re Boden*, 1 D. M. & G. 57.

² *Re Meyrick*, 9 Ha. 116.

³ *Tooke v. Beauport*, Bay. 297.

⁴ *Moses v. Thornton*, 8 T. R. 808 ; *Doe d. Woodmaise v. Mason*, 1 Esp. N. P. C. 53 ; *Keimpton v. Cross*, Ca. temp. Hardw. 108.

rolls of inferior courts, however, will be admitted as evidence of title as to matters peculiar to their jurisdiction.¹

The judgments and sentences of all competent courts of justice, as well of equity as of law, are conclusive evidence of the facts they decide.²

So, also, the sentence of any foreign court, of competent jurisdiction, directly deciding a question which was properly cognizable by the law of the country, seems to be conclusive in this country. Thus the sentence of a foreign court, of competent jurisdiction, directly establishing a marriage in that country, would be conclusive in any of our courts on the validity of the marriage.³

The book of the Court of Chancery would appear to be sufficient evidence of a decree for alimony pronounced in that court, without such decree being drawn up in form.⁴

It is now decided that a bill in Chancery will only be evidence to show that such a bill did exist.⁵ It will not be admitted as evidence to prove any facts either alleged or denied by the bill;⁶ and a demurrer or plea to a bill in equity does not so admit the facts charged in it, as to be evidence against the defendant, of those facts, in a future action between the same parties.⁷

But answers in Chancery, being confessions on oath, will be evidence of the facts sworn to by the party who makes them, against him;⁸ and an examined copy of the answer will be a sufficient proof of it;⁹ but it cannot be regularly given in evidence without proof of the bill, for without the bill there does not appear to be any cause depending.¹⁰

Where, in an ejectment, examined office copies of a bill in Chancery, filed by the defendant for an injunction, and of an affidavit

1 *Bull N. P.* 247.

2 See 1 *Phill. Ev.* 320, 348, 390; *Clarges v. Sherwin*, 12 *Mod.* 343; *Marriott v. Hampton*, 7 *T. B.* 269; *Bull N. P.* 234; *Doug.* 222, n. 13; *Buchanan v. Rucker*, 1 *Camp.* 63; *Burke v. Crooke*, 1 *Ball. & B.* 489.

3 See *Roach v. Garvan*, 1 *Ves.* 159; 1 *Phill. Ev.* 350-352.

4 *Holston v. Smith*, 2 *Car. & Pay.* 22.

5 *Lord Ferrers v. Shirley*, *Fitzgib.* 196, *Bull. N. P.* 235; *Bowerman v. Sybourn*, 7 *T. B.* 3; 1 *Wightw.* 325.

6 *Bandbury Peerage case*, 2 *Selw. N. P.* 685; 1 *Phill. Ev.* 358-9.

7 *Tompkins v. Ashby*, 1 *Moo. & Mal.* 82.

8 1 *Phill. Ev.* 359; and see *Hudson v. Revett*, 5 *Bing.* 368.

9 16 *East.* 334. *Swer v. Ambrose*, 6 *Dow. & Ry.* 127.

10 See 1 *Phill. Ev.* 393.

purporting to have been made in the equity suit, by a person of the same name and description, to support a motion for an injunction, and alleging title to the premises, in one of the lessors of the plaintiff, were produced to prove the title, it was held that the copy of the affidavit was not admissible without proof of identity, or that it had been used.¹ But an examined copy of a deposition in Chancery is admissible in evidence, for the purpose of contradicting the testimony of the same person when produced afterwards as a witness.²

A decree in the Court of Chancery may be given in evidence in the same manner and for the same purposes as the verdict or judgment of a court of common law.³ It may be proved by an exemplification under the seal of the court, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer.⁴

By-Laws.—Under the Municipal Act⁵ the Councils of every Township, County, City, Town and Incorporated Village may pass by-laws, “for selling the original road allowance to the parties next adjoining whose lands the same is situated, when a public road has been opened in lieu of the original road allowance, and for the site or line of which compensation has been paid, and for selling in like manner to the owners of any adjoining land any road legally stopped up or altered by the Council; and in case such parties respectively refuse to become the purchasers at such price as the Council thinks reasonable, then for the sale thereof to any other person for the same or a greater price.”

No such by-law is to be passed,⁶ “until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the immediate neighbourhood of the original allowance for road; and published weekly for at least four successive weeks in some newspaper (if any there be) published in the municipality; or if there be no such newspaper, then in a newspaper published in some neighbouring municipality; nor until the Council has heard, in person or by counsel or attorney,

¹ *Rees v. Howell*, 1 Bouson 1 M. & Cl. 363.

² *Highfield v. Peaks*, 1 Moo. & Mal. 109.

³ 1 Phill. Ev. 358.

⁴ *Trowet v. Castle*, 1 Keb. 21. Com. Dig. Ev. (C. 1.) 1 Phill. Ev. 392, 393.

⁵ Con. Stat. U. C. c. 64, s. 331, sub. sec. 6; 29 & 30 Vic. c. 51, s. 333, sub. sec. 6; 36 Vic. ch. 48, sec. 425, sub. s.

⁶ Con. Stat. U. C. c. 64, s. 321; 29 & 30 Vic. c. 51, s. 328; 30 Vic. ch. 48, sec. 424.

any one who may be prejudicially affected thereby, and who petitions to be so heard."

County Councils may also make by-laws¹ "for stopping up, or stopping up and sale, of any original allowance for road or parts thereof within the County, which is subject to the sole jurisdiction and control of the Council, and not being within the limits of any Village, Town or City within or adjoining the County."

Township Councils² may pass similar by-laws, but in both cases requirements as are pointed out above are necessary to the validity of the by-law; and in the case of Township Councils³ it is further necessary that the by-law be confirmed by a by-law of the Council of the County in which the township is situate, at an ordinary session of the County Council, not sooner than three months, nor later than one year next after the passing thereof.

If the trustees of any police village,⁴ or fifteen of the inhabitant householders of any unincorporated village or hamlet, consisting of not less than twenty dwelling houses, standing within an area of two hundred acres, petition the Council of the Township in which it is situate, and in case it is not a police village, if such petition is accompanied by a certificate from the County Registrar that a plan of the village has been duly deposited in his office, the Council may pass a by-law to stop up, sell and convey, or otherwise deal with any original allowance for road lying within the limits of the village or hamlet, as laid down on the plan, but such by-law is to be made subject to the provisions as to sale of road allowances.

In case⁵ any one in possession of a concession road or side line has laid out and opened a road or street in place thereof without receiving compensation therefor, or in case a new or travelled public road has been laid out and opened in lieu of an original allowance for road, and for which no compensation has been paid to the owner of the land appropriated as a public road in place of such original allowance, the owner, if his lands adjoin the concession road, side line or original allowance, shall be entitled thereto in lieu

1 Con. Stat. U. C. c. 54, s. 342, sub-sec. 1; 29 & 30 Vic. c. 51, s. 344, sub-sec. 1; 36 Vic. ch. 48, sec. 400, subsec. 1.

2 Con. Stat. U. C. c. 54, s. 343, sub-sec. 2; 29 & 30 Vic. c. 51, s. 345, sub-sec. 2; 36 Vic. ch. 48, sec. 441, sub. 2.

3 Ibid.

4 Con. Stat. U. C. c. 54, s. 344; 29 & 30 Vic. c. 51, s. 346; 36 Vic. ch. 48, sec. 443.

5 Con. Stat. U. C. c. 54, s. 332; 29 & 30 Vic. c. 51, s. 334; 36 Vic. ch. 48, sec. 423.

of the road so laid out, and the Council of the Municipality upon the report in writing of its Surveyor or of a Deputy Provincial Land Surveyor that such new or travelled road is sufficient for the purposes of a public highway, may convey the said original allowance for road in fee simple to the person or persons upon whose land the new road runs, and when any such road allowance is, in the opinion of the Council, useless to the public, and lies between lands owned by different parties, the Municipal Council may, subject to the conditions aforesaid, sell and convey a part thereof to each of such parties as may seem just and reasonable; and in case compensation was not paid for the new road, and the person through whose land the same passes does not own the land adjoining the original road allowance, the amount received from the purchaser of the corresponding part of the road allowance when sold shall be paid to the person who at the time of the sale owns the land through which the new road passes.

Under the recent Municipal Act,¹ Township Councils may purchase from the Government or any corporation or person all the wet lands at the disposal of the Crown or such corporation or person in any such Township, and the Council may possess and hold the land so purchased, and may, whenever they deem it expedient, sell or otherwise depart with or dispose of the same by public auction in like manner as they may by law sell or dispose of other property, and upon such terms and conditions, and with such mortgages upon the land so sold, or other security for the purchase money or any portion thereof, as they may think most advantageous.

To the titles derived under such by-laws the observations made on titles under acts of Parliament apply; all the provisions of the acts must be complied with and strictly followed.

Powers of Sale.—On investigating a title depending upon the due exercise of a power of sale contained in a mortgage, it is important to observe under what terms the power or trust is to arise; in what manner it is to be exercised; and particularly whether any notice is required to be given to the mortgagor prior

¹ 29 & 30 Vic. c. 51, s. 345, sub. sec. 5; 36 Vic. ch. 42, sec. 372, sub-sec. 15.

to the sale ; and if so, whether proper notice has been given according to the terms of the deed.¹

A power, in a mortgage deed, to the mortgagee to sell, is in the nature of a trust, but it may be exercised without the concurrence of the mortgagor.² The mortgagee, like every other trustee, is bound to use all the means in his power to get the fairest and best price for the property.³

Where the power of sale is general, a mortgagee may accept a fair offer by private contract, without first advertising the estate, and he is not bound to wait upon speculation for a better bidding, or to put up the estate by auction, and although the purchaser is bound to see that the sale is authorized by the power, he is not bound to enquire what steps have been antecedently taken for the purpose of promoting the sale.⁴

The mortgagor cannot purchase under the power so as to relieve himself from subsequent charges made by him before the sale ;⁵ and perhaps the rule would be the same if the estate was sold to a stranger and purchased from him by the mortgagor.⁶

The mortgagee cannot, by a pretended sale, acquire the property as his own ; relief from such a sale would be afforded even at a considerable distance of time.⁷

If the mortgage is silent as to notice being given to the mortgagor, prior to the sale, it has been held that notice should be given if the power to sell is vested not in the mortgagee, but in some third person as a trustee ; but if the mortgagor has entrusted the mortgagee with the power of selling, no notice is requisite unless provided for by the deed.⁸

Where notice is required to be given, the power in this respect, as in all others, must be closely followed. And in every case, whether notice is required to be given by the power or not, it is a

1 *Lee* on Abs. 141.

2 *Sug. V. & P.* 65.

3 *Orme v. Wright*, 3 Jur. 19, *Richmond v. Evans*, 8 Grant, 508 ; *Latch v. Forlong*, 12 Grant, 308.

4 *Davey v. Durrant*, 1 DeG. & J. 585.

5 *Otter v. Lord Fauz*, 2 K. & J. 650 ; 6 D. M. & G. 638.

6 *Sug. V. & P.* 66 ; and see *McDonald v. Reynolds*, 14 Grant, 691.

7 *Robertson v. Norris* 1 Giff. 421 ; *Popham v. Ezham* 10 Ir. Ch. R. 440 ; *Howard v. Harding*, 18 Grant, 181.

8 *Anon*, 6 Mad. 10 ; *Lee* on Abs. 141.

prudent course to give notice to subsequent incumbrancers who are entitled to redeem the mortgage.

Tax Titles.

Many titles in this Province depend upon the regularity of tax sales, and wherever a Sheriff's deed on a sale for taxes forms a link in a title, it should be subjected to close scrutiny. Indeed the irregularities in connection with tax sales have been so great that it may almost be said here as it has been said in the United States,¹ that "a tax deed is *prima facie* void."

So much litigation arose out of tax sales, and in connection with tax titles, that at length the Legislature interposed for the purpose of quieting such titles. The act² relating to the assessment of property, passed in 1866, contained a clause providing, that whenever lands had been sold for taxes and the Treasurer had given a deed for the same, such deed should be binding against all persons, except the Crown, unless questioned before a Court of competent jurisdiction within four years after the passing of the act, in cases where the land had been sold and the deed given before the act; and in the case of lands sold or deed given after the passing of the act, unless so questioned within four years from the giving of the deed.

In 1869, a more comprehensive act³ was passed by the Legislature of Ontario, the preamble of which recites, that, "Whereas many lands in the Province of Ontario having been liable to be assessed for taxes, have been assessed or sold for taxes, and frequently in such cases the sales or the conveyances made thereon are invalid by reason of defects or irregularities caused by the public officers, or the municipalities charged with the assessing, sale or conveyance; and the original owners, whose lands were sold, have for the period during which the land was so assessed, and since, neglected or refused to pay any taxes or to redeem the lands; and whereas, also, in many cases the purchasers at such sales, or those claiming under them, have entered into possession and continued in

¹ *Blackwell on Tax Titles*, 25.

² 29 & 30 Vic. c. 63, s. 156.

³ Ont. Stat. 33 Vic. c. 28.

possession for several years, and made extensive improvements on the lands, and paid the taxes charged thereon without any steps having been taken by the original owners to question the validity of such sales, and also in other cases after improvements so made those who have made the same have, after many years' occupation, been dispossessed by the original owners or by purchasers from them at a small and inadequate price; and it is expedient that a remedy be provided in those cases where purchasers or those claiming under them have gone into possession and improved, and also where the lands having continued vacant, the purchaser or those claiming under him have paid taxes since the sale; and it is also expedient that those claiming lands sold for taxes should assert their own right of action or of entry, or forego such rights rather than sell the same to a purchaser." [The act then goes on to enact "that in all cases where lands liable to be assessed had been sold and conveyed for taxes in arrear under colour of the statutes in that behalf, and the purchaser had entered into and continued in occupation of the land sold or part of it, for four years prior to the first of November, 1869, and had made improvements to the value of \$200, the sale should be deemed valid." [From the effect of this section, however, certain exceptions were made. The section does not apply, where the taxes had been paid before the sale, or the land redeemed within the time limited; nor in cases of fraud by the purchaser; nor where the purchaser had been ejected by the original owner, who had since continued in possession. In cities, towns and villages, buildings only were to be deemed improvements, and the purchaser at tax sale could not in any case claim to include in the valuation of improvements, any improvements begun by him after the institution, and during the pendency, of any suit brought to dispute the validity of, or set aside, the sale. Where any of the property sold had been subdivided into lots before the sale, occupation and improvement of any lot or lots had the effect of making the sale valid only as to the lot or lots so occupied and improved.

Tax sales were also made valid in the case of vacant lands, if the purchaser had paid eight years' taxes prior to the first of November, 1869, and the original owner had not occupied the land for one year between the sale by the Sheriff and the first of November, 1869. For the tax purchaser to have the benefit of this provision,

it is not necessary for him to prove that the taxes paid by him had been legally charged, production of the treasurer's books, shewing that such taxes had been charged and paid, is sufficient.¹

In cases where the land sold had not been included in any return of lands by the Surveyor-General, still, if the patent had issued, and the patentee had occupied for at least two years before the sale, occupation for four years by the tax purchaser, and improvements to the amount of \$200, made the sale valid. And where the sale was a valid one, or made valid by the act, the conveyance by the Sheriff was not to be invalid by reason of the statute, under the authority of which the sale was made, having been repealed, or the Sheriff who made the sale having gone out of office, before the conveyance was made.

Where the sale or conveyance is void for uncertainty, and the purchaser has improved the land, the value of the land and improvements is to be assessed in a particular mode, and the claimant is to pay for the improvements, unless the tax purchaser elects to retain the land on paying its value. Where the title of the tax purchaser is not valid, or not made valid by the act, or where no remedy is otherwise given by the act, he has a lien on the lands for the purchase money paid at the sale, and for all taxes subsequently paid by him, with ten per cent. interest.

The act does not apply to any case where the original owner was at the time of the sale, and has since been, in occupation of the land. It forbids the conveyance of rights of entry adverse to a tax purchaser in possession, and for this purpose revives the common law, and the 2nd, 3rd, and 4th sections of the 32 Hen. VIII. ch. 9.

Since this act, a tax sale which took place before its passing, cannot be objected to on account of uncertainty in the description, nor on the ground that the Sheriff did not proceed in the sale, and that the sale was not made as required by the statutes then in force.²

By this act of the Ontario Legislature, much of what is contained in the immediately succeeding pages is rendered obsolete. It is,

¹ *Fraser v. West*, 21 C. P. U. C. 161.

² *Davis v. Van Norman*, 30 Q. B. U. C. 457.

however, retained as an historical record of legislative and judicial decisions in connection with tax titles.

Since 1793, the acts relating to the assessment of property and levying taxes thereon have been numerous, have followed each other in such rapid succession, and have been so varied in their provisions, that the law relating to such matters is in an exceedingly unsatisfactory state.¹

Under the earlier acts,² the only remedy provided for levying taxes upon default in payment, was by distress and sale of the defaulter's goods and chattels. The 51 Geo. III., ch. 8, passed in 1811, provided,³ that all lands held in fee simple, by Land Board certificate, Order of Council, or certificate of a Governor of Canada, should be considered rateable property; that the amount levied should not in any one year exceed one penny in the pound;⁴ and that in default of payment, the amount should be levied by distress and sale of the defaulter's goods and chattels.⁵

With the exception of an act⁶ passed in 1798, which permitted the Justices of the Peace of a District in Quarter Sessions assembled to levy a rate for establishing stone monuments at Township boundaries, and to sell lands for default in payment, the first act authorizing the sale of lands for arrears of taxes was the 6 Geo. IV. ch. 7, passed in 1825.

Surveyor-General's Return.—The act passed in 1819⁷ followed the 51 Geo. III., ch. 8, as to the lands liable to taxation, and to enable the municipal officers to impose an equal rate, and to inform them with certainty as to the proper lands chargeable therewith the Surveyor-General was required,⁸ on or before the 1st day of July, 1820, to furnish the Treasurer of each district with a list or schedule of the lots in every town, township, or reputed township of the district, as the same were designated by numbers, concessions

1 33 Geo. III. c. 3; 43 Geo. III. c. 12; 47 Geo. III. c. 7; 51 Geo. III. c. 8; 55 Geo. III. c. 5; 59 Geo. III. c. 7; 59 Geo. III. c. 8; 6 Geo. IV. c. 7; 9 Geo. IV. c. 3; 7 Wm. IV. c. 19; 1 Vic. c. 20; 4 & 5 Vic. c. 10; 13 & 14 Vic. c. 67; 16 Vic. c. 182; 16 Vic. c. 183; 27 Vic. c. 19; 29 & 30 Vic. c. 53; Ont. Stat. 32 Vic. c. 36; Ont. Stat. 33 Vic. c. 23; Ont. Stat. 34 Vic. c. 6.

2 33 Geo. III. c. 3; 43 Geo. III. c. 12; 47 Geo. III. c. 7; 51 Geo. III. c. 8.

3 Sec. 4.

4 Sec. 6.

5 Sec. 8.

6 38 Geo. III. c. 1.

7 59 Geo. III. c. 7.

8 Sec. 12.

or otherwise, on the original plan, specifying to whom the lot, or any and what part of it had been described as granted by His Majesty, and whether the same or any and what part thereof was ungranted, and also what lots were reserved as Crown or Clergy Reserves, or for other public purposes, and to whom such reserve or any part thereof had been leased; and he was also, on or before the first day of July in each and every year thereafter, to transmit a list of all lots or parcels of land, specifying the quantity granted or leased, since the last list furnished by him; and¹ all the lands included in such list as granted or leased were liable to taxation whether occupied or not.

By the 13 & 14 Vic. ch. 67, passed in 1850, the return² was to be made by the Commissioner of Crown Lands within thirty days after the first day of January in each and every year; and by the 16 Vic. ch. 182, sec. 48, the return was to include all lands in respect of which a license of occupation had issued during the preceding year.

By the 27 Vic. ch. 19, passed in 1863,³ unpatented lands vested in or held by Her Majesty, thereafter sold or agreed to be sold, or located as a free grant, were made subject to taxation from the date of the grant, and all lots formerly granted were made liable to taxation from the 1st of January, 1863.

The return of the Surveyor-General or Commissioner of Crown Lands is the foundation of the whole proceeding for taxation of lands,⁴ as no lands can be assessed which are not included in the schedule;⁵ and it forms the basis on which the County Treasurer had formerly to keep an account for every parish, town, township, reputed township, or place within its district according to the list or schedule furnished by the Surveyor-General, in which account he was to enumerate particularly every lot or parcel of land in each township, reputed township, or place, according to the schedule, and charge or credit it for the amount of the taxes and rates payable or paid in respect of it for each and every year;⁶ and from

¹ Sec. 13.

² Sec. 20.

³ Sec. 9.

⁴ *Dos d. Upper v. Edwards*, 5 Q. B. U. C. 598.

⁵ *Peck v. Monro*, 4 C. P. U. C. 368.

⁶ 59 Geo. III. c. 7, s. 14; *Peck v. Monro*, 4 C. P. U. C. 368.

which he is now to furnish to the clerk of each local municipality the information necessary for the guidance of the assessors as to what lands are liable to be assessed.¹

Before the statute required the return to be made in January, it was held that land returned in June for assessment, was liable for the taxes for the whole of the current year.²

Land held by a Crown Land Agent's receipt and not by patent, lease, or license of occupation, and not occupied, was not, before the 1st of January, 1863, liable to assessment, though returned by the Commissioner of Crown Lands under 16 Vic. ch. 182, s. 48, as land to be assessed.³

Assessment.—A question has been raised, what is the assessment, and by whom and when is it made?

In *Laughtenborough v. McLean*⁴ the Court of Common Pleas decided, that "the assessment is the rating which is made upon the assessment roll by the assessor, and that it is completed when the roll is finally passed. If this be so, then it follows that the entry as made upon that roll is the assessment which is to govern, and that all the other copies and entries ought to correspond with the primary roll and are only copies of and entries from it."

The 59 Geo. III. ch. 7, required⁵ the Treasurer to keep an account with each lot or parcel of land, and charge or credit it for the amount of the taxes and rates payable or paid in respect of it for each and every year.

Where⁶ the rates and assessments upon any lot of land remained in arrear and unpaid for the space of three years, they were to be increased in the proportion of one-third; if in arrear five years, then they were to be increased one-half; and if suffered to remain in arrear for eight years, the amount of the arrears was to be doubled, and the rates were thenceforth to be charged against the

1 13 & 14 Vic. c. 67 s. 39; 16 Vic. c. 182, s. 48; Con. Stat. U. C. c. 55, s. 109; 29 & 30 Vic. c. 53, s. 110; Ont. Stat. 32 Vic. ch. 36, sec. 109.

2 *Doe d. Stata v. Smith*, 9 Q. B. U. C. 653.

3 *Street v. Kent*, 11 C. P. U. C. 255; *Street v. Simcos*, 12 C. P. U. C. 284; *Street v. Lambton*, 12 C. P. U. C. 204.

4 14 C. P. U. C. 175.

5 Sec. 14.

6 Sec. 15.

lands by the Treasurer, and levied in double the amount that would grow due according to the existing rate or assessment.

In 1828, it was enacted,¹ that no greater accumulation than fifty per cent. should be charged upon any lands on which the taxes should be paid before the 1st of July, 1829; and thereafter fifty per cent. and no more was to be charged in all cases in which the taxes remained in arrear longer than five years.

By the 13 & 14 Vic. ch. 67, taxes accrued on any land were made² a special lien on the land, having a preference over any claim, lien or incumbrance of any party except the Crown, and one which does not require registration to preserve it, and which bears interest from the time the taxes become due, which interest is to be deemed part of the taxes.

The 16 Vic. ch. 182, required³ the Treasurer, on the 1st of May in each year, to complete and balance his books by entering against each parcel of land, the arrears, if any, due at the last settlement, and the taxes of the preceding year which may remain unpaid. If at the making of such balance it appeared that any arrear of taxes was due upon any parcel of land, the Treasurer was to add to the whole amount then due, ten per cent. thereon.⁴ This was reduced to eight per cent.⁵ in 1866, and again raised to ten per cent. in 1868.⁶

The ten per cent. on arrears of taxes was calculated on the whole amount in arrear and due upon the land, and not merely on the amount of each year's assessment.

In *Gilespie v. The City of Hamilton*⁷ the question was raised whether the ten per cent. authorized to be charged upon arrears of taxes, should be added to the amounts in arrear in each year, including the previous additions of ten per cent., or simply on the amount of taxes then in arrear, and it was held that it should be added to the whole amount. Draper, C. J., in delivering judgment said, "I think the Legislature have used language very clearly indicating an

1 9 Geo. IV. ch. 3 sec. 4

2 Sec. 36.

3 Sec. 51; Con. Stat. U. C. ch. 55, sec. 115.

4 16 Vic. ch. 182, sec. 53; Con. Stat. U. C. ch. 55, sec. 121.

5 20 & 30 Vic. ch. 53, sec. 126.

6 Ont. Stat. 32 Vic. ch. 36, sec. 125.

7 12 C. P. U. C. 428.

intention that ten per cent. should be added every year, calculated on the whole amount which is in arrear and due upon the lands at the time the charge is made. In the present case the lands were liable to satisfy a given sum on the 1st of May, 1862, which sum included taxes for preceding years, and ten per cent. added thereto at the preceding 1st of May. To that sum which constituted the whole amount due on the lands, the statute, as I read it, directs that ten per cent should be added."

By the earlier acts the amount of taxes which could be charged in one year was limited.

The 51 Geo. III., ch. 8, sec. 6, provided that the sum levied should not exceed, in any one year, one penny in the pound.

By the 59 Geo. III., ch. 7, the Justices of the Peace in Quarter Sessions were¹ not to raise more money than was required for defraying the public expenses of the District, and this was to be apportioned among those "who were named in the rate roll;" which did not include the non-residents.

Where the Quarter Sessions did not assess certain lands, but the Treasurer left blank columns in his books for certain years, and charged of his own authority, at indefinite times, the maximum charge of one penny in the pound, under the idea that the statute had imposed that sum, which was generally known as the wild land tax, on all lands, a sale for the arrears of such taxes was held void.²

The 59 Geo. III., ch. 8, enacted,³ that all unoccupied lots of land should be rated one-eighth of a penny per acre annually towards defraying the expense of making and maintaining roads, and in the case just cited, the sale although made to satisfy such rate also, was held void, because illegal rates were included in the amount for which the land was sold.

By the 4 & 5 Vic., ch. 10, sec. 41, the amount which could be raised by assessment was made two pence in the pound, and for district purposes one penny half-penny in the pound.

¹ Sec. 7.

² *Cotter v. Sutherland*, 18 C. P. U. C. 402.

³ Sec. 3.

An assessment under this act of so much per acre, instead of on the assessed value, has been held illegal.¹

Where the Surveyor-General returned a tract of land as a single lot, it has been held that it must be assessed as one lot, though half of it may be in one concession and half of it in another,² and where several lots are included in one grant, but described by separate numbers, a portion of each lot must be sold to pay the taxes due upon such lot, and not a portion of the whole block, beginning at the boundary from which the lots are numbered, for the taxes due upon the whole.³

Treasurer's Return of Lands in Arrear.—By the 6 Geo. IV., c. 7, passed in 1825, provision was made "for levying under certain restrictions, the assessments which may remain in arrear, by the sale of a portion of the lands on which the same may be charged."

That act provided⁴ that the Treasurer of each District should at the next Quarter Sessions after the 1st of July, 1828, present to the Justices in Quarter Sessions, an accurate account of all lands in the district upon which the assessment or any part thereof was in arrear for the space of eight years, specifying the lot or parcel of land by number, concession and township, or otherwise, as the same appeared in the schedule furnished to the Treasurer, and also⁵ the amount due for assessment thereon; and should also at the Quarter Sessions next after the 1st of July in each year thereafter furnish a like account.

The Treasurer was also,⁶ within one month after rendering his account, to insert in the Upper Canada Gazette, and in some public newspaper in the district, a list of all the lots returned by him in his account, as liable to sale, and if no newspaper was published in the district, he was, within the same time, to affix a list in some conspicuous place in each township.

By the 13 & 14 Vic., c. 67, passed in 1850, the Collector, if any taxes remained unpaid, was required,⁷ when returning his roll, to

¹ *Doe d. McGill v. Langton*, 9 Q. B. U. C. 91; *Williams v. Taylor*, 13 C. P. U. C. 219.

² *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 594.

³ *Munro v. Gray*, 12 Q. B. U. C. 617; *McDonald v. Robillard*, 23 Q. B. U. C. 105; *Ridout v. Ketchum*, 5 C. P. U. C. 60; *Black v. Harrington*, 12 Grant, 175; *Christie v. Johnston*, 12 Grant, 534.

⁴ Sec. 6.

⁵ Sec. 6.

⁶ Sec. 9.

⁷ Sec. 42.

deliver an account of all the taxes remaining due, showing opposite each separate assessment the reason why he did not collect the same, by inserting "non-resident," or, "no property to distrain," to make oath that the sums mentioned in the account remained unpaid, and that he had not by diligent enquiry been able to discover any goods or chattels upon which he could levy; and such account was made sufficient authority for the Treasurer to proceed to sell the lands.

The Treasurer was thereupon¹ to enter in a book kept for the purpose, a copy of the roll so far as it related to the lands of non-residents, together with the taxes charged upon such lands; and he was within one month after receipt of the roll to address a circular letter through the post to the owners of the several lots stating the amount due, and calling for payment, and if he was unable to satisfy himself as to the owner of any lot or where he resided, he was to put in the Official Gazette a list of the lands, setting forth the total amount due on each lot, and calling for payment; charging to the land the expense of publication.

The act also required² the Treasurers of Counties, on or before the 1st of January, 1851, to make out and submit to the Municipal Council of the County a list of the lands in their respective counties on which any taxes remained unpaid, stating the number of acres in each lot or part lot, the number of years for which it was in arrear for taxes and the amount of taxes due, together with the names of the owners so far as such Treasurer had been able to ascertain them, and the amount of such arrears were to be added to the assessment roll for 1851. A sale under this of occupied lands as non-resident has been held illegal.³

The 16 Vic., c. 182, s. 47, required a similar return of lands on which the Collector had been unable to collect the taxes, to be made to the Township Treasurer, and it was made⁴ the duty of the latter officer to return a correct copy of the roll to the County Treasurer.

¹ Secs. 43, 44

² Sec. 46.

³ *Street v. Fogul*, 32 Q. B. U. C. 119.

⁴ Sec. 49.

By this act¹ the necessity for a return to the County Council of lands in arrear for taxes, as a preliminary to their sale, seems to have been done away with, and the Treasurer was empowered whenever a portion of the taxes had been due on any lot for five years, to issue a warrant for sale by the Sheriff, but the Council could direct that no warrant should issue until some portion of the arrears were due for a period longer than five years.

This course continued to be pursued until 1866, when the 29 & 30 Vic., c. 53, which substituted the County Treasurer for the Sheriff as the officer to sell lands for arrears of taxes was passed. This act requires² the Treasurer to submit to the Warden a list in duplicate of all lands liable to be sold for taxes, with the amount of arrears against each lot set opposite the same. To each of these lists it is made the duty of the Warden to affix the seal of the Corporation and his signature, and one of them is to be deposited with the Clerk of the County, and the other returned to the Treasurer, with a warrant annexed under the hand of the Warden and seal of the County, commanding him to levy the arrears.

In an ejectment suit by a purchaser of land sold for taxes under 6 Geo. IV., c. 7, it has been held³ necessary to prove that a return was made of the land having been the proper time in arrear for taxes, and that the writ to sell was grounded on this return.

The books of the Treasurer showing the land to be in arrear, are sufficient proof of the fact of arrear, but it has been doubted whether the warrant to sell would be so;⁴ and that the taxes were in fact in arrear for the proper time.⁵ An extract from the Treasurer's books showing the taxes to be unpaid, is not sufficient evidence of the fact.⁶

Writ to Sell.—By the 6 Geo. IV., c. 7, upon the Treasurer⁷ laying before the Quarter Sessions the list of lands in arrear for taxes, it was made⁸ the duty of the Clerk of the Peace in each district to

¹ Sec. 55; Con. Stat. U. C. ch. 56, ss. 123, 124.

² Sec. 192.

³ *Doe d. Bell v. Resumore*, 8 Q. B. O. S. 243.

⁴ *Hall v. Hill* 22 Q. B. U. C. 578; 2 Er. & Ap. 569.

⁵ *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 594; *Doe d. Sherwood v. Matheson*, 9 Q. B. U. C. 321; *Harbourns v. Boushey*, 7 C. P. U. C. 464; *Errington v. Dumble*, 8 C. P. U. C. 66; *Allan v. Fisher*, 18 C. P. U. C. 68; *Myers v. Brown*, 17 C. P. U. C. 307; *Bank of Upper Canada*, 18 Grant, 74.

⁶ *Munro v. Grey*, 12 Q. B. U. C. 647.

⁷ Sec. 6.

⁸ Sec. 7.

make out a warrant for levying the assessment due, specifying in the writ the particular lot or parcel of land, and the amount due thereon, which warrant was to be signed and sealed by the Clerk of the Peace, directing the Sheriff of the district to levy the amount therein stated to be due, together with certain fees imposed by the act, by sale of such portion of the lands and tenements upon which the assessments were chargeable, as should be sufficient for that purpose, provided there was no distress upon the lands from which the same could be made, and if there was such distress, then to levy the same by sale of the distress. This¹ writ was to be made returnable at the third Quarter Sessions after issuing the same, and the Sheriff was directed to have the moneys levied under the writ at the said Court.

The writ to sell continued to be issued by the Clerk of the Peace until 1850, when the 13 & 14 Vic., c. 67, enacted,² that the County Treasurer should, within thirty days after the Collector made his return, issue a warrant under his hand and seal directed to the Sheriff of the County, commanding him to levy on the lands of non-residents for the amount of taxes remaining due thereon and his costs.

The 16 Vic., c. 182, s. 55, empowered the Treasurer to issue the warrant whenever a portion of the taxes on any land had been due for five years.³ Since 1869 the sale may be whenever a portion of the taxes has been in arrear for three years.⁴

In the warrant, the Treasurer was required⁵ to distinguish such lands as had been patented, from those which were under a lease or license of occupation and of which the fee remained in the Crown, and this continued to be the case until 1866.⁶ The 29 & 30 Vic., c. 53, s. 129, contains no similar provision.

The writ to sell must be founded upon the Treasurer's return; and it must be under the seal as well as the signature of the proper officer, and if not sealed, all sales under it are void.⁷

¹ Sec. 8.

² Sec. 48.

³ Con. Stat. U. C. ch. 55, sec. 124; 29 & 30 Vic. ch. 53, sec. 129.

⁴ Ont. Stat. 32 Vic. ch. 56, sec. 128.

⁵ 16 Vic. c. 182, sec. 56; Con. Stat. U. C. ch. 55, sec. 125.

⁶ *Doe d. Bell v. Reaumur*, 3 Q. B. O. S. 243; *Errington v. Dumble*, 3 C. P. U. C. 65.

⁷ *Morgan v. Quessel*, 23 Q. B. U. C. 530.

A mistake in representing the taxes as due from the 1st of July, 1820, to the 1st of July, 1828, in place of from the 1st of January to the 1st of January of these years, has been held not important, the taxes being in fact due for the full period of eight years.¹

A writ issued in 1837, and postponed by 1 Vic. c. 20, was held properly acted upon in 1839.²

The omission, since 1853, to distinguish, in the writ, whether the lands were patented or under lease or license of occupation, has been held fatal to it;³ and to a sale under it;⁴ but describing the lands as "all patented,"⁵ or, as "all deeded,"⁶ is sufficient. Describing the lands to be sold, in a schedule which is incorporated with the warrant, so as to be a part of it, is sufficient. The writ should show the particular land that is to be sold; there being confusion and doubt in this respect will avoid the sale;⁷ but if the identity can be established it is sufficient.⁸

The writ can issue only after the full period is past for which the land can be sold.⁹ Thus were the first year's taxes were imposed by a by-law passed in July, 1852, but the collector's roll was not delivered until after August, 1852, a sale under a Treasurer's warrant dated 10th July, 1857, was held invalid.¹⁰

Where a new county is created, and taxes become due to it, and taxes are also and were due before the separation, the writ to sell goes to the Sheriff (treasurer) of the new county to sell for the arrears due both counties.¹¹

Distress.—In the case of sales under the earlier tax acts it is necessary to show that there was no sufficient distress on the premises.¹²

Under the 6 Geo. IV., c. 7, s. 7, the warrant to be issued by the Clerk of the Peace directed the Sheriff to levy the amount due, by

¹ *Doe d. State v. Smith*, 9 Q. B. U. C. 658.

² *Todd v. Werry*, 15 Q. B. U. C. 614; *Hamilton v. McDonald*, 22 Q. B. U. C. 236.

³ *Hall v. Hall*, 23 Q. B. U. C. 878; 2 C. 2 Ex. & Ap. 569; *McAdie v. Corby*, 30 Q. B. U. C. 240.

⁴ *Brooke v. Campbell*, 12 Grant, 536.

⁵ *Cook v. Jones*, 17 Grant, 490.

⁶ *Hall v. Hall*, 23 Q. B. U. C. 878.

⁷ *Townsend v. Bullett*, 12 C. P. U. C. 217.

⁸ *McDonnell v. McDonald*, 24 Q. B. U. C. 74.

⁹ *Kelly v. Macklem*, 14 Grant, 20.

¹⁰ *Censor v. McPherson*, 18 Grant, 607, and see *Ford v. Proudfoot*, 9 Grant, 478; *Bell v. McLean*, 18 C. F. U. C. 416.

¹¹ *Doe d. Mountcashel v. Grover*, 4 Q. B. U. C. 28.

¹² *Doe d. Bell v. Reammore*, 3 Q. B. O. S. 248; *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 504.

sale of such portion of the land as should be sufficient for that purpose, provided there was no distress thereon from which the same could be made, and if there was such distress, then by sale of the distress.

The Sheriff was not obliged to look for a distress on the land between the time he first offered it for sale, and the time when an adjourned sale was had, and a distress in fact being upon the land between these two periods did not invalidate the sale.¹ The old law as to the omission to distrain invalidating a sale seems to have been altered by the 13 & 14 Vic. c. 67.²

The 16 Vic. c. 182, enacted³ that it should be lawful for the Treasurer, whenever he should be satisfied that there was a distress upon the lands of non-residents in arrear for taxes, to issue a warrant under his hand and seal to the Sheriff, who should thereby be authorized to levy the amount due upon any goods and chattels found upon the land, in the same manner, and subject to the same restrictions, as referred to distress made by a Collector.⁴

The 58th section required the Sheriff, if at any time after the receipt of the warrant to sell, he had good reason to believe that there was a distress upon any parcel of land included therein, to levy the arrears of taxes and the costs by distress and sale of any goods and chattels found on the land. To this section a proviso was added that no subsequent sale of any such parcel of land by the sheriff should be held illegal or invalid by reason of there having been any goods and chattels thereon before or at the time of the sale, and the Sheriff having neglected to levy the tax by the distress and sale of the same.

The 27 Vic. c. 19, passed in 1863, provided⁵ that the Treasurer and Sheriff should not be required to inquire before sale of land for taxes whether there was any distress upon the lands, but the more recent statutes⁶ contained a provision as to the Treasurer similar to that contained in the 16 Vic. c. 182, s. 54, except that the warrant

¹ *Hamilton v. McDonald*, 22 Q. B. U. C. 136.

² *Hamilton v. McDonald*, 22 Q. B. U. C. 136; *McDonnell v. McDonald*, 24 Q. B. U. C. 74.

³ Sec. 54; see also Con. Stat. U. C. ch. 55, sec. 122.

⁴ Secs. 42, 43 and 44.

⁵ Sec. 4.

⁶ 29 & 30 Vic. ch. 53, sec. 127; Ont. Stat. 32 Vic. c. 36, sec. 136. See *Snyder v. Skibley*, 21 Q. P. U. C. 518.

issued by the Treasurer is to be directed to the Collector of the local municipality instead of to the Sheriff.

Section 4 of this act covers all errors as regards the purchaser at a tax sale, if any taxes, in respect of the land sold, had been in arrear for five years; and this applies where an occupied lot has been assessed as unoccupied.¹

It was not made the duty of the Treasurer to search for a distress on lands; but if satisfied that there was a distress, it would be necessary to allege and prove that he had notice of the distress.²

Even the neglect of a collector whose duty it was to search for distress, has been held not to invalidate a sale subsequently made of the land for arrears which might in whole or in part have been satisfied by such distress.³ The old law was otherwise, especially if it could be shown that there was a sufficient distress upon the land at the time of the sale.⁴

Advertisement.—The 6 Geo. IV, c. 7, required the Sheriff,⁵ within one month after receiving the writ, to insert in the Upper Canada Gazette, and in all the printed newspapers in the district, a notice of the time and place at which he would attend to sell the lands and if no newspaper was published in the district, then the notice, was to be affixed on the door of the Court House, and also in two or more places in each township.

By the 13 & 14 Vic. c. 67, the sale⁶ was to be advertised once in each month for four successive months, in some newspaper of the County, if any such, and if none, then in a newspaper in an adjacent county, and the last insertion of the advertisement was required to be at least one week prior to the day of sale. The Sheriff was also required⁷ to post a notice similar to the advertisement in some convenient and public place in the county, three weeks before the time of sale. These notices⁸ were to state the names of all owners

¹ *Bank of Toronto v. Fanning*, 18 Gr. 391.

² *Foley v. Moodie*, 16 Q. B. U. C. 254.

³ *Allan v. Fisher*, 13 C. P. U. C. 63; *Stewart v. Taggart*, 22 C. P. U. C. 284.

⁴ *Dobbie v. Tully*, 10 C. P. U. C. 432; but see *Doe d. Powell v. Rorison*, 2 Q. B. U. C. 201; *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 594; *Staford v. Williams*, 4 Q. B. U. C. 488; *Fraser v. Mattice*, 19 Q. B. U. C. 150.

⁵ Sec. 19.

⁶ Sec. 54.

⁷ Sec. 51.

⁸ Sec. 52.

known to the Sheriff, with the total amount of taxes assessed on their lands respectively, and when the owners were not known, the advertisement was to state the total amount of taxes upon the several lots or half-lots.

The 16 Vic. c. 182, required the Sheriff,¹ immediately upon receipt of the Treasurer's warrant to prepare a list of all the lands included therein, and the amount of arrears due on each parcel, and cause the same to be published for the space of three months in the Government Official Gazette, and in some one newspaper published within the county, or if none published in the county, in some newspaper published in an adjoining county. In this advertisement lands patented were to be distinguished from those the fee of which was in the Crown,² and it was to contain³ a notification that unless the arrears were sooner paid, the Sheriff would proceed to sell the lands for the taxes, on some day named in the advertisement, which day was required to be more than three months after the first publication. A notice similar to the advertisement was also to be posted in some convenient and public place at the Court House of the county, at least three months before the time of sale.⁴

Under the recent acts⁵ the advertisement issued by the County Treasurer, who is now the officer entrusted with the sale of lands for taxes, is to contain similar information as to the amount of arrears, a notification that the lands will be sold on a given day unless these are sooner paid, and to distinguish the lands as patented or unpatented. In addition the advertisement is to state in a separate column the proportion of costs chargeable upon each lot for advertising, and for the commissions allowed to the Treasurer.

The advertisement is by these acts⁶ to be published four weeks in the Official Gazette, and once a week for thirteen weeks in some newspaper published in the county, or in an adjoining county, as the case may be. It is also expressly enacted⁷ that the day of sale shall be more than ninety-one days after the first publication of the list.

¹ Sec. 57.² Sec. 56.³ Sec. 57.⁴ Sec. 57.⁵ 29 and 30 Vic. ch. 53, secs. 133, 134; Ont. Stat. 33 Vic. ch. 36, secs. 133, 135.⁶ Secs. 132, 133.⁷ Secs. 134, 135.

This section was probably introduced on account of the doubt raised in the case of *Connor v. Douglas*.¹ In that case it was held by the Chancellor (and afterwards approved by the Court of Error and Appeal) that publication in the *Canada Gazette* for thirteen weeks, from and including the 1st of August, to and including the 24th October, 1857, though not an advertisement for three months, which would have required the advertisement to be continued till and to include the 31st of October, did not render the sale invalid.

In *Jarvis v. Brooke*,² it was held that the omission to advertize the sale in the county local paper, the advertisement being regularly published in the *Official Gazette*, did not invalidate the sale. This decision was arrived at because such an omission would not, on common law principles, avoid a sale under execution.

The Court of Common Pleas, however, in *Williams v. Taylor*,³ held that the omission to advertise in a local paper under the special provisions of 16 Vic. c. 183, ss. 7 and 8, avoided the sale, saying, "The omission of either of these advertisements interposes an insuperable obstacle to the application of the remedial portion of the act in favor of purchasers at such sales."

In the later case of *Hall v. Hill*,⁴ the Court of Queen's Bench, speaking of *Williams v. Taylor*, said, "That decision though under a different statute was upon a case very analogous in principle, and if it were necessary for the decision of this case, we should as at present advised, arrive at the same conclusion."

Sale.—By the 6 Geo. IV., c. 7, no⁵ sale was to take place in less than six months from the delivery of the writ to the Sheriff, nor was any sale to be made out of the township in which the land was situate, unless the township was so thinly inhabited as to have no meeting held within it for the election of pariah officers, in which case the sale might take place in the township to which the same might be annexed for the purpose of holding its annual town meeting.

1 15 Grant, 456; and see *McLaughlin v. Pyper*, 20 Q. B. U. C. 526.

2 11 Q. B. U. C. 299.

4 23 Q. B. U. C. 578.

3 13 C. P. U. C. 219.

5 Sec. 11.

The¹ mode of selling was to be by public auction, and the assessment in arrear and the expense attending the writ were to be declared, and the person who offered to pay the assessment and expense for the least portion of the lands was to be considered the purchaser.

In selling, the Sheriff was to expose the lands for sale in the following manner :² "He shall begin at the front angle on that side from whence the lots are numbered, and measure backward, taking a proportion of the width corresponding in quantity with the proportion of such particular lot, in regard to its length and breadth, according to the quantity required to make the sum demanded ; and at every subsequent sale of a portion of the same lot or parcel of land, under this act, shall proceed to take a tract of equal width as the former measuring backward from the limits of the tract last sold." Where the Sheriff could not, from the position or description of the land, pursue the mode pointed out above, he was to sell such portion of the lot as appeared to him most for the interest of the proprietor.³ He had also⁴ power to adjourn the sale from day to day, giving public notice thereof, and if any person did not pay the amount of his purchase on the day of sale, the Sheriff could re-sell on any other day to which the sale was adjourned.

Several alterations were made in 1837, by the 7 Wm. IV., c. 19. The sale⁵ of lands for arrears of taxes was to take place in the Town in which the General Quarter Sessions for the District were held, on the second day of the sitting of the Court, at or near the Court House.

The land was to be put up for sale at an upset price of two shillings and sixpence an acre, and if there was no bidder at that rate, then the Sheriff was to proceed according to the former act,⁶ at the next Court of Quarter Sessions after the expiration of the six months' notice required by law.

The fifth section made it lawful for the Sheriff to put up and adjudge to the purchaser such part of the lot as he might in his discretion think best for the interest of the proprietor.

1 Sec. 12.
3 Sec. 14.
5 Sec. 1.

2 Sec. 12.
4 Sec. 16.
6 Geo. IV., ch. 7.

The 13 & 14 Vic., c. 67, required the¹ Sheriff to sell by public auction so much of the lands as should be sufficient to discharge the taxes, with the interest thereon, and all lawful charges incurred in and about such sale and the collection of the taxes, selling in preference such part of the land as he might consider it most for the advantage of the owner to sell first. The 16 Vic., c. 182, contained² a similar provision.

Where the Sheriff sold land of which the fee was in the Crown, he was to sell only the interest therein of the lessee or locatee.³

The recent acts⁴ which substitute the Treasurer for the Sheriff as the officer who is to sell lands for taxes, contain provisions exactly the same as to selling such part as the Treasurer may consider best for the owner to sell first. These acts further declare that, "In offering such lands for sale, it shall not be necessary to describe particularly the portion of the lot which shall be sold, but it shall be sufficient to say that he would sell so much of the lot as shall be necessary to secure the payment of the taxes due." This clause was probably inserted because V. C. Mowat had held⁵ it necessary that the Sheriff should state to intending purchasers what portion of the lot was being offered for sale.

Where the warrant to sell contained two entries of taxes due on the same lot, and the Sheriff on one day sold the land for the taxes entered as due for 1858, and a month after, at an adjournment of the sale, sold the same lot to another person, for the taxes entered as due for 1859, the Court set aside the first sale because at it the Sheriff did not sell for all the taxes due on the lot, but for a portion only. The second sale was also declared void because the Sheriff having previously, at the same sale and under the same warrant, sold the land, he could not sell it again to another person.⁶ The Court distinguished the case just referred to from *Mills v McKay*,⁷ where a sale having taken place in 1865 for arrears of taxes extending from 1859 to 1865, another sale took place in 1866 for the taxes

¹ Sec. 52.

² Sec. 59; and see Con. Stat. U. C. ch. 55, sec. 127.

³ 16 Vic. ch. 182, sec. 55; Con. Stat. U. C. ch. 55, sec. 128.

⁴ 29 & 30 Vic. ch. 58, sec. 139; Ont. Stat. 32 Vic. ch. 26, sec. 128.

⁵ *Knaggs v. Ledyard*, 12 Grant, 520, and see *Grant v. Gilmore*, 21 C. P. U. C. 18.

⁶ *Schaefer v. Lundy*, 20 C. P. U. C. 443.

⁷ 15 Grant, 192.

of 1858 which had been overlooked at the time of the first sale. V. C. Mowat held that the first sale must prevail, on the ground that the Legislature did not intend to allow Municipal Corporations to make successive sales for parts of the taxes in arrear at one time.

The sale of a whole lot which lay in two concessions; for an arrear of taxes alleged to be due upon one half, has been held illegal, because there was no such distinct half to be assessed.¹ The assessment should have been on the whole lot.

A sale for a total charge of £5 11s. 8d., of which only £1 8s. had been legally imposed was held to be wholly void;² but the good rate being separable from the bad, held not to defeat a distress in toto.³

In *Allen v. Fisher*,⁴ however, Draper, C. J., though he considered he was bound by the authorities on the point, said, "I have felt a difficulty in holding a sale entirely void, on the ground that the amount directed to be levied was larger than was properly due."

The statutory provision requiring certain rates to be kept separate on the Collector's roll is directory only, and where the direction had not been observed, a sale for non-payment of taxes was held valid notwithstanding.⁵

A purchaser procuring the whole lot to be knocked down to him, by requesting the bystanders not to bid against him as he wanted to confirm his title by purchasing it in, acted improperly, and the sale so conducted is void.⁶

In *Henry v. Burness*,⁷ where the conduct of the Sheriff in selling the whole of a valuable lot of land for a trifling amount of taxes was impeached, counsel contended that the Sheriff could not be taken to know the value of a whole lot necessarily so greatly ex-

1 See *Doe d. Uppor v. Edwards*, 5 Q. B. U. C. 504; *Monro v. Gray*, 12 Q. B. U. C. 647; see also *McDonald v. Robillard*, 23 Q. B. U. C. 106; *Laughtonborough v. McLean*, 14 C. P. U. C. 175; *Ridout v. Ketchum*, 6 C. P. U. C. 55; *Black v. Harrington* 12 Grant, 175; *Christie v. Johnston*, 12 Grant, sec. 534.

2 See *Doe d. McGill v. Langton*, 9 Q. B. U. C. 91; *Irwin v. Harrington*, 12 Grant, 179, and see *Febham v. Hall*, 15 Grant, 235; *Edinburgh Life Assurance Co. v. Ferguson*, 32 Q. B. U. C. 275.

3 *Corbet v. Johnston*, 11 C. P. U. C. 317.

4 13 C. P. U. C. 72.

5 *Cook v. Jones*, 17 Grant, 438.

6 *Todd v. Werry*, 15 Q. B. U. C. 614.

7 8 Grant, 245.

ceeded the arrears of taxes that a sale of the whole was improper. But V. C. Spragge said¹ "This implies that the Sheriff is not bound to acquaint himself with what he is selling; that he may remain properly ignorant of the improvements, the quality of the soil, and of every particular beyond the number of the lot and the assumed quantity. I by no means concede that he can properly be ignorant of these particulars; he has peculiar facilities for becoming acquainted with them, and if he had not, still if it be his duty to sell for the best price, as I take it to be, he cannot discharge that duty if so utterly ignorant of what he is selling as not to know whether it is worth £2 10s. or £500. Besides, the statute, in making it the duty of the Sheriff to sell not only as little as possible, but that part which is the least injurious to the land-owner, seems to contemplate his making himself acquainted with the land he is selling."

In that case, combination among the purchasers was also relied on as a ground for setting aside the sale. On that head the learned Vice-Chancellor said, "I do not mean to say that actual combination is necessary to invalidate such a sale. The prevention of competition by any undue means, I apprehend, would be sufficient because against public policy, and a fraud upon the sale."²

Where the writ to sell was delivered to the Sheriff when in office, but he did not sell till he was out of office, the sale was held invalid, as it was not shown that he had while in office, begun to act upon it.³

It has been doubted whether land, improperly assessed as non-resident land, when it was in fact occupied, can be legally sold for arrears.⁴

Where taxes are due to an old county, and taxes become due to a new county after separation, the sale for both arrears should be made by the Sheriff of the new county where the land lies.⁵

Payments.—None of the acts in express terms authorize the Sheriff to receive payment of the taxes in arrear after receipt of the

¹ *Henry v. Burness*, 8 Grant, 267.

² See also *Davis v. Clark*, 8 Grant, 358.

³ *McMillan v. McDonald*, 26 Q. B. U. C. 464.

⁴ *Allan v. Fisher*, 18 C. P. U. C. 68.

⁵ *Doe d. Mountcashel v. Grover*, 4 Q. B. U. C. 23.

warrant to sell. The 53rd section of the 13 & 14 Vic., c. 67, directs the Sheriff to sell, "if no person shall appear to pay the taxes at the time and place appointed for the sale." And in the subsequent acts,¹ the words used are, "If the taxes shall not have been previously collected, or if no person shall appear to pay the taxes at the time and place appointed for the sale." These expressions imply that the Sheriff may receive payment, and accordingly it has been held that a payment of taxes to the Sheriff, while he had the warrant to sell, is good.²

After the sale takes place, the owner has still a period allowed for redeeming. This was at first twelve months,³ then it was extended to three years,⁴ and again reduced⁵ to "one year from the day of sale, exclusive of that day," at which it has since remained.⁶

After the sale of a whole lot for taxes, the Treasurer may receive payment of the taxes in redemption of a part of it, if the lot had been in fact subdivided, and the Treasurer determines in good faith that such part was a distinct division.⁷

If the Treasurer can take notice of land granted, though not returned as such, he must take notice of the particular part of the lot so granted, and he must apply the payments made to him on the part so granted.⁸

Description of lands.—The 6 Geo. IV. c. 7, having fixed the manner in which the Sheriff was to ascertain the exact portion sold, by beginning to measure it from a given point and taking a proportionate width of the lot, a description of thirty acres of Lot 15. &c., to be measured according to the statute, has been held a sufficient description.⁹

The subsequent act 13 & 14 Vic. c. 67, which required the Sheriff to sell the part most advantageous for the owner, provided that he

1 16 Vic. ch. 182, sec. 59; Con. Stat. U. C. ch. 55, sec. 137; 29 & 30 Vic. ch. 53, sec. 139; Ont. Stat. 32 Vic. ch. 36, sec. 138.

2 *Doe d. Sherwood v. Mattheson*, 9 Q. B. U. C. 321; *Jarvis v. Cayley*, 11 Q. B. U. C. 282; *Jarvis v. Brooke*, 11 Q. B. U. C. 290.

3 6 Geo. IV. ch. 7, sec. 13.

4 13 & 14 Vic. ch. 67, sec. 54.

5 16 Vic. ch. 182, sec. 64; Con. Stat. U. C. ch. 55, sec. 143.

6 29 & 30 Vic. ch. 53, sec. 149; Ont. Stat. 32 Vic. ch. 36, sec. 143.

7 *Payne v. Goodyear*, 26 Q. B. U. C. 448; *Brooks v. Campbell*, 12 Grant, 526.

8 *Peck v. Monro*, 4 C. P. U. C. 363.

9 *Fraser v. Mattice*, 19 Q. B. U. C. 150; *McIntyre v. G. W. Railway Co.*, 17 Q. B. U. C. 118.

should state distinctly in the certificate to be delivered to the purchaser, what part of the lot was sold, or that the whole lot was sold, as the case might be; and the deed given to the purchaser was¹ to describe the land by its situation, boundaries and quantity.

In the 16 Vic. c. 182, ss. 59 & 65, the words used as to the certificate and deed are the same as those in the 13 & 14 Vic. c. 67, ss. 54 & 57.

The more recent acts² require the Treasurer to "give a description of the part sold with sufficient certainty, and if less than a whole lot, then by such a general description as may enable a surveyor to lay off the land sold on the ground."

A description of the land sold by the Sheriff as "eighty-nine acres of the south part of Lot twenty-five, &c." would be insufficient, for want of the proper boundaries defining the precise locality.³ So a sale of land for taxes, the only description of which in the Treasurer's warrant and Gazette, was "Pt of S. pt. 111, 1st Con. Tay., 40 acres," could not be supported.⁴ The designation "N. or W. $\frac{1}{2}$ 14," has been held sufficient.⁵ And since the Ont. Stat. 32 Vic. ch. 36, sec. 138, a sale of 89 acres of a particular lot has been held sufficient.⁶

The Deed.—Where lands were sold under the 6 Geo. IV. c. 7, but no deed was made of them while that act was in force, it was held that no deed could be made after the repeal of the act in 1851, as no provision was made for such a case,⁷ and the same thing was decided as to sales made under 13 & 14 Vic. c. 67.⁸ A deed may now be made by the successor of the Sheriff who sold.⁹

Formerly no time was limited within which it was necessary to register a deed of land sold for taxes, but it is now necessary to register it within eighteen months after the sale.¹⁰ The same acts

¹ Sec. 57.

² 29 & 30 Vic. ch. 53, sec. 147; Ont. Stat. 32 Vic. ch. 36, sec. 146.

³ *McDonnell v. McDonald*, 24 Q. B. U. C. 74; see also *Taylor v. Foster*, 25 Q. B. U. C. 406; *Knaggs v. Ledyard*, 12 Grant, 320; *Fraser v. Mattice*, 19 Q. B. U. C. 150.

⁴ *Grant v. Gilmour*, 21 C. P. U. C. 13.

⁵ *Stewart v. Taggart*, 22 C. P. U. C. 284.

⁶ *Stewart v. Taggart*, 22 C. P. U. C. 284.

⁷ *Bryant v. Hill*, 23 Q. B. U. C. 96.

⁸ *McDonald v. McDonald*, 24 Q. B. U. C. 424.

⁹ 27 & 28 Vic. ch. 2, sec. 43.

¹⁰ 29 Vic. ch. 24, sec. 57; Ont. Stat. 31 Vic. ch. 20, sec. 58.

require all deeds on tax sales, before the passing of the acts, to be registered within one year after the passing of the acts.

In the case of *Cotter v. Sutherland*,¹ an objection was taken which the Court said struck at the root of every tax sale resting upon a rate imposed before the General Assessment Act of 1850, and invalidated every one of them. This objection was that no Court of Quarter Sessions ever imposed a rate of any kind upon wild lands, but that the Treasurer of his own motion charged every wild lot one penny in the pound of its statutable value under the idea that the statute directly imposed that tax upon the land.

In the same case many points of importance were decided for more particular notice of which reference must be made to the very able and exhaustive judgment delivered by Mr. Justice Adam Wilson.

Sheriff's Deeds.—Where a title is derived through a sale by a Sheriff under an execution, the purchaser's solicitor must see that there is a judgment duly entered up of record;² that the writ under which the Sheriff sold was valid on the face of it;³ and that it was acted upon while current.⁴

A purchaser under a writ valid on its face will be protected even though the judgment under which the land was sold should afterwards be reversed for error appearing on the record.⁵

The conveyance from the Sheriff is *prima facie* evidence that the writ was delivered to him, that he took the lands in execution, and sold them.⁶ A purchaser is not bound to enquire whether a writ against goods properly returned "*nulla bona*" before the writ against lands was issued. Neither need he enquire whether the lands were duly advertised or not, as errors and defects in the advertisements, either in the Gazette or local papers, will not

1 18 C. P. U. C. 357.

2 *Doe d. Boulton v. Ferguson*, 5 Q. B. U. C. 515; *McDonell v. McDonell*, 9 Q. B. U. C. 250; but see *Douglas v. Bradford*, 3 C. P. U. C. 459.

3 *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510.

4 *Doe d. Greenshields v. Garrow*, 5 Q. B. U. C. 237; *McDonell v. McDonell*, 9 Q. B. U. C. 250; *Gardiner v. Juson*, 2 Er. & App. 188.

5 *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510.

6 *Doe d. Spafford v. Brown*, 3 O. S. 90; *Mitchell v. Greenwood*, 3 C. P. U. C. 465. A purchaser is not estopped by improper recitals in a sheriff's deed. *Roe v. McNeil*, 1 U. C. L. J. N. S. 111.

affect the purchaser's title, even if he be one of the execution creditors.¹ A sale was duly advertised in a local paper for three months before the 27th August, 1864, and an advertisement in some particulars incorrect was inserted in the Gazette, of the 11th of June, 1864, and four next issues, the errors being corrected in the sixth insertion, all these advertisements were of a sale on the 27th of August, 1864. On the 1st of October following and in the five next numbers of the Gazette, the sale was advertised for the 12th of November, not as a postponement of the previous sale, but this advertisement was not published in a local paper, and although a notice was put up on the door of the Court House, it was not shown that it was continued there for three months. Under these circumstances the Court of Queen's Bench held² that these advertisements were not a compliance with the statute,³ but that the defects would not affect the purchaser's title. In that case C. J. Draper said, "There is no decision that a Sheriff's sale under execution of land is invalid by reason of erroneous or defective advertisements in the Gazette or the local newspaper; and the language of the late Chief Justice in *Jarvis v. Brooke*⁴ shews that there have been decisions (though unreported) the other way, where lands have been sold in execution, and though we might think the purchaser could have little reason to complain where he was one of the execution creditors, and also the attorney on record, if the proceedings were held nugatory by reason of any irregularity or omission in advertising, we think this no reason for incurring the risk of shaking other titles where the purchaser has had no such necessity or opportunity for watching the proceedings. We think we ought not, by a decision given for the first time after so many years, to deter purchasers at Sheriff's sales by holding it to be their duty to examine into every step of the Sheriff's proceedings under a valid writ supported by a valid judgment.

The purchaser should satisfy himself that the writ was acted upon while current, as nothing can be done under an execution

1 *Doe d. Myers v. Myers*, 9 Q. B. U. C. 465.

2 *Paterson v. Todd*, 24 Q. B. U. C. 296.

3 Con. Stat. U. C., ch. 22, sec. 267.

4 11 Q. B. U. C. 269; and see *Jarvis v. Cayley*, 11 Q. B. U. C. 289; *Doe d. Dissat v. McLeod*, 3 Q. B. U. C. 297.

which has ceased to be current: unless for the purpose of perfecting what has been commenced while it was in force.¹

Insolvency.—In England on investigating titles to estates which have been subject to the bankruptcy laws, it is always usual and requisite shortly to abstract the proceedings under the commission or fiat.² So in this Province the preliminary proceedings under which the insolvent's estate became vested in the assignee should be examined. Some practitioners require proof of the act of bankruptcy, but except in very particular cases this is not usual.³

Under the provisions of the Insolvent Act⁴ the Assignee may sell the real estate of the insolvent, but only after advertising for a period of two months in the same manner as is required for the actual advertisements of sales of real estate by the sheriff in the district where such real estate is situate.⁵ The period of advertising may be shortened to not less than one month by the creditors, with the approbation of the judge. Where the price offered for any real estate at public sale duly advertised, is in the opinion of the assignee too small, he may withdraw it from the sale, and sell subsequently under such directions as he may receive from the creditors.

The purchaser's solicitor must enquire whether the sale was duly advertised, and where the time has been shortened, or the land has been withdrawn from public sale and sold afterwards under the directions of the creditors, whether the order and resolution directing the assignee how to proceed was duly passed by a majority of the creditors present at the meeting. Where the time is shortened it is also necessary to show the approval of the judge.

The 48th section of the act gives a sale of real estate by an assignee the same effect as if the sale had been made by a sheriff under a writ of execution. As the title given by a sheriff's sale is the title that was in the execution debtor at the time the

1 *Doe d. Greenhalghs v. Gorrow*, 5 Q. B. U. C. 287; *McDonell v. McDonell*, 9 Q. B. U. C. 25: *Gardener v. Juson*, 2 Er. & Ap. 188.

2 *See on Abstracts*, 163.

3 *See on Abstracts*, 163.

4 22 & 23 Vic. ch. 16, sec. 47.

5 As to advertising by sheriffs see Con. Stat. U. C. ch. 22, sec. 267.

writ was placed in the sheriff's hands, a purchaser from an assignee under a voluntary assignment obtains the title of the insolvent in the property at the date of the assignment. In the case of a compulsory liquidation the assignee conveys the title that the insolvent had at the date when the writ of attachment was placed in the Sheriff's hands.¹

Of the Evidence of the Facts Referred to in Abstracts.

I. *Births, marriages and deaths.*—We shall class the rules as to proving these facts under one head, because, in general, the same evidence which will prove the one will prove the others.

The proof of these facts has been much simplified by the Con. Sta. U. C. ch. 72.

The regular proof of the celebration of a marriage is the certificate of the clergyman who performed the ceremony, such certificate being one which he is required by statute² to give the parties if they desire it; or the evidence of parties present at the marriage. In case of the absence or death of the witnesses present at the marriage, a certified copy, by the Registrar of the County, of the return made to him by the clergyman who performed the ceremony is made sufficient evidence by the statute.³ Under the Act for Quieting Titles, a marriage must be proved by the production of the certificate. Affidavits will not be received unless the absence of the certificate is satisfactorily accounted for.⁴

In the case of old marriages, where the parties have been long dead, and the place of the marriage is unknown, resort must often be had to the presumptive evidence of general reputation.⁵ The chief danger attending presumptive evidence of marriage is, that such evidence may be rebutted by either of the parties; but after the death of both parties, such evidence may be safely relied on.⁶

The mere entry of a christening, unaccompanied by any evidence showing that the person was young at the time of the christening, does not prove the fact of the birth in a particular parish.⁷

¹ 32 & 33 Vic. ch. 16, sec. 29.

² Con. Stat. U. C. ch. 72, sec. 4.

⁵ 1 Byth. 168; Con. Con. Ev. 285.

⁷ *Rea v. North Petherton*, 2 B. & C. 508; and see *Rea v. Inhabitants of Trowbridge*, 7 B. & C. 252. *Rea v. Inhabitants of Lubbenhawe*, 5 B. & Ad. 968. *Dunn v. Donovan*, 3 Hagg. 301. *Rea v. Clapham*, 4 C & P. 29.

³ *Ibid.* sec. 7.

⁴ *Re Harris*, 2nd Dec. 1869.

⁶ 1 Byth. 168; Con. Con. Ev. 283.

An entry of a marriage in a book of Fleet marriages cannot be read as a register, not having been compiled under public authority;¹ and copies of registers of baptism kept in the Island of Guernsey, or in a foreign chapel, are not admissible in our courts of law as evidence.²

An entry in the books of the Navy Office is evidence of the death of a sailor in the king's service.³

A certificate under seal of a minister abroad, as to the fact of a marriage having been solemnized before him, has been admitted but it would not now be allowed.⁴

The production of the letters of administration to a person's effects is not even *prima facie* evidence of his death;⁵ nor is the registry of baptism *prima facie* evidence of the age of the person.⁶

Reputation is, as a general rule, sufficient evidence of marriage; and where it appears on a trial that the mother was received into society as a respectable woman, under such circumstances improper conduct will not be presumed.⁷ So also, if the reputed husband and wife eloped together for the purpose of being married, and returned as having been married;⁸ or if they have joined in a deed, &c., for the purpose of barring the wife's right of dower;⁹ or evidence of other circumstance taking place which can only be explained by the relationship of husband and wife subsisting between them, will all, after the deaths of the parties, be admissible to prove the fact of the marriage.¹⁰

When a vendor claims as remainder-man after a life estate, direct evidence of the death of the tenant for life will not be neces-

¹ *Reed v. Passer, Peake*, N. P. C. 231. *Lloyd v. Passingham*, Coop. C. C. 155.

² *Huet v. Le Mesurier*, 1 Cox, C. C. 275; *Whitehead v. Wynne*, 1 J. & W. 483; *Leader v. Barry*, 1 Esp. N. P. C. 333; *Rez v. Inhabitants of Bathwick*, 2 B. & Ad. 639; *Beasley v. Beasley*, 3 Hag. 639. *Doe d. Wollaston v. Barnes*, 1 M. & R. 336.

³ *Bull. N. P.* 249.

⁴ *See Alsop v. Bestrell*, Cro. Jac. 541; *Willes*, 549.

⁵ *Moore v. Bernales*, 1 Russ. 301.

⁶ *See Huet v. Mesurier*, 1 Cox, 275; *Wiken v. Law*, 3 Stark. 63.

⁷ *Doe d. Flemming v. Flemming*, 4 Bing. 266; 12 J. B. Moo. 509; and see *Macneil v. MacGregor*, 1 Dow. N. S. 206. *Morris v. Miller*, 1 Bl. 632; 8 C. 4 Burr. 2067. *Reed v. Passer*, 1 Esp. N. P. C. 318, 353; *Doug.* 174; *Cowp.* 594. *Gordon v. Gordon*, 3 Swans. 400.

⁸ *Cook v. Lloyd, Peake* Ev. 23.

⁹ *Cooke v. Lloyd, Peake* Ev. 23, *Harvey v. Harvey*, 2 Bla. 899.

¹⁰ *Harvey v. Harvey*, 2 Bla. 899. *Lord Braybrooke v. Inskip*, 8 Ven. 417. *Rez v. Inhabitants of Brampton*, 10 East, 282. *Goodright v. Moss*, *Cowp.* 591. *Rez v. Inhabitants of Bramley*, 6 T. R. 830. *May v. May*, *Bull. N. P.* 112; 2 Str. 1067. *Haydon v. Gould*, 1 Salk. 119. *Wilkinson v. Payne*, 4 T. R. 468.

sary; the evidence of strangers residing in the neighbourhood as to the fact will be sufficient.¹

An entry in the registry book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not admissible in evidence; nor is the private memorandum of the fact made by the clerk who was present at the baptism.²

The registers of baptisms and burials kept by dissenters in England are not strictly evidence, although they will afford a reasonable presumption of the facts which they attest.³

Where the person whose age or legitimacy is to be proved is a peer of the realm, and has taken his seat in the House of Lords, as these facts must have been proved at that time, it is not usual to call for fresh proof of them.

Intestacy.—Intestacy must be proved by the letters of administration which have been granted of the intestate's effects, or if it be stated that no letters have been granted, searches should be made in the proper offices, according to the circumstances, to ascertain the fact: or a partial intestacy may be proved by the production of the will, by which it appears that the property in question was undivided or unaffected.

Legitimacy.—Legitimacy must be proved by a certificate of the marriage of the parents, and proof of their being respectively of age at the time of the marriage, or that they married with the consent of their parents or guardians, and that they complied with the provisions of the Marriage Act in force at the date of the marriage. The registry of the christening of the child is generally deemed sufficient evidence of its legitimacy, as it is usual to notice the illegitimacy in the registry,⁴ and illegitimacy will not be presumed on slight grounds.⁵

1 *Doe v. Deakin*, 4 B. & A. 433. As to where equity will act upon the presumed death of persons long unheard of, see *Bailey v. Hammond*, 7 Ves. 590; *Dixon v. Dixon*, 3 B. C. C. 510; *Lee v. Wilcock*, 6 Ves. 606; *Mainwaring v. Baxter*, 5 Ves. 468.

2 *Doe d. Warren v. Bray*, 8 B. & C. 313; 8 C. 8 M. & R. 423.

3 Sec. 32; *Ex parte Taylor*, 1 Jac. & W. 483; *Whittuck v. Waters*, 4 C. & P. 375.

4 *May v. May*, 2 Stra. 1073; and see *Rez v. Head*, cit. Peak. Ev. 86.

5 See *Doe d. Flemming v. Flemming*, 4 Bing. 266; *Braybrook v. Inskip*, 8 Ves. 417; *Cope v. Cope*, 1 M. & R. 266; Con. Sta. U. C. ch. 82.

Death without issue.—In one case, Sir W. Grant decreed payment of a legacy, to the persons entitled in remainder, on evidence that a female to whose issue it was first given was of the age of fifty-five, and unmarried, she consenting thereto.¹ The fact of death without issue is usually proved by an affidavit, made by some near relative of the party; but the death of a party without issue will be presumed after a hundred years.² The best proof that a person never was married or had issue, is, that none of the family ever heard of it.³ But where the lessor of the plaintiff claimed by descent, and proved the death of his elder brothers, it was held to be necessary to prove also that they died without issue, as no presumption will be admitted against the person in possession.⁴

Executorship and Administratorship.—Where it is necessary to prove that a person is executor or administrator, the probate of the will, or the letters of administration, must be produced;⁵ but the probate act book of the Court, containing an entry of a will being proved, and of probate being granted to the executors named therein, will be admitted as evidence of those persons being the executors, without accounting for the non-production of the probate.⁶

Where the question was whether letters of administration had been duly granted to a plaintiff, and letters of administration granted by the Bishop of C. to the plaintiff were produced, but it was proved that the intestate, at the time of his decease, had *bona notabilia* in another diocese in a different province; and no evidence was given as to the residence of the defendant at the death of the intestate; it was held that the letters of administration were not void, inasmuch as the other diocese in which the intestate had *bona notabilia* was in a different province.⁷

Title.—Payment of a small unvaried rent for a long series of years to the lord of the manor, is evidence only of a title to the rent, but not to the land.⁸

¹ *Fraser v. Fraser*, 1 Jac. 596 n.

² *Rowe v. Hasland*, 1 W. Bl. 404; *Doe d. Oldham v. Wolley*, 8 B. & C. 22; *Doe d. Banding v. Grifft*, 15 East, 293.

³ *Doe d. Banning v. Grifft*, 15 East, 293; *Doe d. Oldham v. Wolley*, 8 B. & C. 22.

⁴ *Richards v. Richards*, 15 East, 294 n.

⁵ See *Smartie v. Williams*, 8 Lev. 387; *Garrett v. Lister*, 1 Lev. 25; *Eldon v. Keddell*, 8 East, 182;

Davis v. Williams, 18 East, 282; *Pinney v. Pinney*, 8 B. & C. 336.

⁶ *Coz v. Allingham*, Jac. 514.

⁷ *Stokes v. Bate*, 5 B. & C. 491.

⁸ *Doe d. Whittocke v. Johnson*, Gow. 173; see *Woolway v. Howe*, 1 A. & E. 114; *Davies v. Lowndes*, 1 Bing. N. C. 606; *Carns v. Nicoll*, 1 Bing. N. C. 450.

Leases are *prima facie* evidence of a person's seisin, but are not direct or conclusive evidence thereof, without proof of the actual seisin of the lessees, unless the estates created by the leases appear to have expired before the time of living memory.¹

Trespasses on a common have been received as proofs of a right to the freehold.²

Possession.—The mere possession of land, if unexplained, is *prima facie* evidence of an estate in fee-simple; and the party so in possession may maintain trespass against unlawful invaders.³

It is not necessary that there should always be deeds or wills produced affecting the property in question during the period for which a title is required to be shown. Possession of itself is a sufficient title, and could it always be clearly shown to have been undisturbed, would, no doubt, be the best of titles.⁴ But as it is difficult to show that possession has never been disturbed, a title where no deeds exist, should be rigidly enquired into and strictly proved.⁵

In *Cottrell v. Watkins*,⁶ the Master of the Rolls said, "I am perfectly satisfied that there are good titles in which the origin cannot be shown by any deed or will; but then you must show something that is satisfactory to the mind of the Court,—that there has been such a long uninterrupted possession, enjoyment and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple."

In another case⁷ it was said, "a party seeking to establish a title by possession against a paper title, and thus to usurp the place of the rightful owner, and supplant him, must do so by clear evidence admitting of no reasonable doubt."

A title by possession, though less satisfactory than one which can be traced to the patentee from the Crown, is a title which,

¹ *Clarkson v. Woodhouse*, 5 T. R. 412 n.

² *Barry v. Bebbington*, 4 T. R. 514; and see *Stead v. Heaton*, ib. 600.

³ 4 Taunt. 17; ib. 547; 5 Taunt. 321; *Harper v. Charlesworth*, 4 B. & C. 574.

⁴ *Lee* on Abs. 26; *Dart* on Vendors, 275.

⁵ *Lee* on Abs. 27.

⁶ 1 Beav. 365.

⁷ *Lou v. Morrison*, 14 Grant, 195.

under an ordinary contract of purchase, a purchaser is bound to accept if duly verified.¹

Lord St. Leonards, in *Scott v. Nixon*,² said, "Can this Court compel a purchaser to take a title depending upon parol evidence of adverse possession, under the new statute? Under the old statute it was long undecided whether a purchaser could be forced to take such a title, but ultimately it was so determined, and I apprehend that it was quite settled, that a clear title, and just as good as any other title, might be acquired by adverse possession, and that a purchaser would be bound to take such a title."

In the subsequent case of *Tuthill v. Rogers*,³ his Lordship said, "Upon a former occasion I was called on to decide whether this Court would enforce, as against a purchaser, a title depending on non-claim, between subject and subject; and I was of opinion that it did not matter how the title was acquired, if it were a good one. * * * I held that the Court was bound to force the title on the purchaser, and that decision has been acquiesced in."

To force such a title on a purchaser, it is not sufficient merely to show possession by the vendor for twenty years. If the vendor relies on a possession of twenty years as giving him a good title, he must show who the person is, that but for this possession would be the owner in fee simple in possession; and that twenty years, possession barred his right.⁴

This it would not do, for example, if, when the twenty years began to run, such owner was an infant, under coverture, an idiot, lunatic, or of unsound mind. In that case,⁵ "such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued, as aforesaid, shall

¹ *Dart on Vendors*, 369; *Sug. V. & P.* 389; *Darby on Limitations*, 389; *Hyde v. Dallaway*, 6 Jur. 119.

² 3 *Dru. & War.* 405.

³ 1 *J. & L.* 72.

⁴ As to the evidence in such a case and the enquiries which should be made, for the person whose title is alleged to be barred, see *Re Caverhill*, 8 U. C. L. J. N. S. 50.

⁵ *Con. Stat. U. C.* ch. 88, sec. 45.

have ceased to be under any such disability, or shall have died (which shall have first happened)."

The statute just quoted, in its terms extended to persons "absent from Upper Canada;" but by a more recent act,¹ "any plaintiff or person in any action, suit or proceeding, either at law or in equity, who has been or is resident without or absent from Upper Canada, shall have no greater or longer period of time to bring, commence or prosecute any such suit, action or proceeding, by reason of such non-residence in, or absence from Upper Canada, than if such plaintiff or person had been or were resident in Upper Canada, when the cause of such action, suit or proceeding, first accrued; and all and every exception or distinction in any law or statute relating to the limitation of actions now in force in Upper Canada, in favor of any plaintiff or person resident without or absent from Upper Canada, by whatever terms or words such residence without or absence from Upper Canada, is stated or described in such law or statute, shall be and the same are hereby abolished and repealed."

In *Low v. Morrison*,² it was argued by counsel, that by this act, only the remedy, and not the right was barred; and that if the party could assert his right without action, he might yet do so unaffected by the statute. But VanKoughnet, C., in giving judgment, said, "I leaned much to that view until I came to consider the 16th section of the Consolidated Statute,³ which enacts that at the determination of the period limited by this act, to any person for bringing any action or suit, the right and title of such person to the land, for the recovery of which such action might have been brought within such period, shall be extinguished.

"Reading the 25th Vic. as abolishing the extended period for bringing an action formerly given to absentees, and as limiting it to twenty years, I must apply the 16th section of the Consolidated Statute, and hold that after the lapse of twenty years, the right and the title of the absentees are extinguished. This law, if harsh, and all *ex post facto* laws are more or less unjust, the Legislature

¹ 25 Vic. ch. 20, sec. 1.

² 14 Grant, 192.

³ Con. Stat. U. C. ch. 88.

is responsible for. They, however, gave absentees a year within which to avail themselves of an existing disability—whether or not this was sufficient to save existing rights is not for me to say—I must adjudicate that the right and title of the absentee are gone equally with those of the resident, where there has been a possession for twenty years adverse to the right or title.”

It must also be borne in mind, that the possession for twenty years will bar only the party entitled to the immediate possession of the land. It will not operate to defeat the right of a person entitled in reversion, until the expiry of twenty years from the time when the particular estate determined, and the reversioner acquired the right of entry.¹

The first section of the statute,² provides, that no person shall make an entry or distress, to bring an action to recover any land or rent, but within twenty years after the time at which the right to make such entry or distress accrued ; and the second section, subsection four, says, that in case of future estates, “such right of entry shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.”

The effect of the statute must, therefore, always be determined with reference to the actual state of the title when the time began to run, so that if the fee should then have been parceled out in particular estates and remainders, the title acquired by means of the statute would, for the most part, be commensurate only with the estates of those persons whose rights may have from time to time have accrued.³

The state of the title when the time begins to run is what has to be considered, for when the statute has once begun to run, a party cannot, by settling his estate, raise up new rights and give new claims to persons deriving under the settlement.⁴ And Mr. Hayes lays it down⁵ as undoubted, that “the effect of the statute must always be determined with reference to the actual state of the title when time begins to run, and that when the time has once com-

1 1 *Hayes* Conv. 253 : *Darby* on Limitations, 390.

2 Con. Stat. U. C. ch. 38.

4 *Stackpoole v. Stackpoole*, 4 Don. & War. 347.

3 1 *Hayes* Conv. 257.

5 1 *Hayes* Conv. 257.

menced running, no subsequent alteration in the title will postpone the bar."

The condition of the land itself at the time possession was taken must also be shown, because if it was in a state of nature, forty years' possession may be necessary to constitute a bar.

By the 27 & 28 Vic. ch. 20, sec. 3, it is enacted that, "In the case of lands granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shown that such grantee or such person claiming under him, while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained; provided always, that no such action shall be brought or entry made after forty years from the time such possession was taken as aforesaid."¹

The limitation of time to forty years was added by the act above quoted, the original act² not having expressed any limit to the time within which the action might be brought, except twenty years after acquiring knowledge of the possession.

To give a good title by possession, it must be shown to have been continuous;³ a person who takes possession of land without title has, while his possession continues, and before the statutory period has expired, a transmissible and inheritable interest in the property. That interest may, it is true, be defeated at any moment by the entry of the rightful owner, but if he is succeeded in the possession by one who claims through him, and who holds until the expiration of the statutory period, such successor has then as

¹ See *Re Linet*, 3 Chan. Cham. R. 230.

² 4 Wm. IV. ch. 1, sec. 17; Con. Stat. U. C. ch. 88, sec. 3.

³ *Young v. Elliott*, 25 Q. B. U. C. 333; *Re Bell*, 3 Chan. Cham. R. 254.

good a right to the possession as if he had himself occupied for the whole period.¹

But if a series of trespassers, adverse to one another, and to the rightful owner, take and keep possession of an estate in succession for various periods, each less than twenty years, but exceeding in the whole twenty years, in whose favour is the right to be declared? The right view seems to be, that the first of such trespassers, has, at the end of twenty years from his entry a right to the possession.

• Possession being *prima facie* evidence of seisin in fee,² the mere fact of priority of possession is sufficient proof of title on which a man can maintain ejectment against any person who was let into possession by him, or who came in as a wrong-doer, while, therefore, the trespasser who is in possession at the time when the twenty years expires, can maintain his possession against the rightful owner, because his title is extinguished, yet he is liable to be ejected by any one who had possession of the property prior to himself, but within twenty years, though without any better title.³

In this country the question of title by possession, as against a paper title, often presents peculiar features, and is not always one of easy solution.⁴ Thus the question has sometimes arisen whether the occupation of part of a lot of land will give title by possession to the whole. The present current of authority seems to be, that such a possession will confer title only to the part actually occupied.

This was the decision of the Court of Queen's Bench in *Hunter v. Farr*,⁵ when C. J. Draper, in delivering judgment, said, "If a man has title to a lot of land, though he has never entered into the actual possession of it, the law deems him to be in possession until some one else enters adversely to him, not recognizing his title, and so *a fortiori* if he enters and occupies part. If without title he enters on a lot which is in a state of nature, clearing and fencing a few acres only, leaving the rest open and unimproved, the actual

1 *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Keefe v. Kirby*, 6 Ir. C. L. R. 291.

2 *Darby on Limitations*, 390.

3 *Doe d. Willis v. Birchmore*, 9 A. & E. 662; *Whitlock v. Asher*, L. R. 1 Q. B. 1; *Groome v. Blakr*, 8 Ir. C. L. R. 432.

4 *Dundas v. Johnston*, 24 Q. B. U. C. 547.

5 23 Q. B. U. C. 327; and see *Doe d. McDonnell v. Rattray*, 7 Q. B. U. C. 321.

possession of the part will not alone, in my opinion, draw to it the possession of the other part."

In *McMaster v. Morrison*,¹ V. C. Mowat, before whom the case was heard, followed the decisions at law, and the plaintiff having failed to prove that the testator exercised any acts of ownership on any portion of the lot except what he cleared, or that he was more than a mere trespasser in respect of even that portion, the learned Vice-Chancellor said, "under these circumstances, he cannot, according to the authorities, be held to have been constructively in possession of any part of the lot of which he was not in actual possession."

The same point was afterwards decided in the same way by the Chancellor in *Low v. Morrison*,² and also by Vice-Chancellor Spragge in *Wishart v. Cook*.³

Although in *McMaster v. Morrison*, V. C. Mowat seems to have founded his judgment upon the fact that no proof was given that the party in possession was more than a mere trespasser, yet it is probable, that following as he did the decisions at law, the learned Vice-Chancellor would have come to the same conclusion, even had it been shown that the party was in possession under an apparent title, or had some show of right.

In *Dundas v. Johnston*,⁴ it is true the language used refers solely to occupation without any title; Draper, C. J., saying, "When, therefore, a person without any title, or without any real or *bona fide* claim of title, (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrong doer can be deemed to have taken, and to be in possession of the whole of such lot:—for example, of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division of the original survey; or that his cultivation and fencing of a small part puts him into possession of as much (be it the whole or a fractional part of a lot) as the proprietor of the part trespassed upon owns. In cases of what is well understood in the country by the term 'squatters,' I have always thought that as against the real owner

¹ 14 Grant, 138.

² 14 Grant, 192.

³ 15 Grant 237.

⁴ 24 Q. B. U. C. 550.

they acquire title by twenty years' occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession."

In the subsequent case of *Young v. Elliott*,¹ the Court came to the same conclusion as in *Dundas v. Johnston*.

As the law now stands, it would, therefore, seem that a party in possession without a paper title, acquires title only to that part of the lot actually occupied by him. Perhaps fuller and further argument may lead to a different conclusion being arrived at.

In the case of a person taking possession of land already cleared and cultivated, when he confines his occupation to a part only of the lot, cultivating that and that only, and allowing the remainder to lie waste, it may be reasonable to assume that such an occupation will confer title only to the part actually occupied. But in the case of wild lands, where, unless a man goes to great expense in the way of fencing to enclose the whole lot, his visible possession and exercise of acts of ownership must be confined to the portion he may clear up and bring under cultivation, it would seem more reasonable to treat such occupation as possession of the whole lot.

Indeed, in *Dundas v. Johnston*,² the Court of Queen's Bench said, "It must depend upon the circumstances of each case, whether the jury may not, as against the person having the legal title, properly infer the possession of the whole lot covered by such a title, in favour of an actual occupant, though his occupation by acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion less than the whole."

In a recent case,³ C. J. Hagarty, in delivering judgment, said, "We are not prepared to hold that unenclosed wood land in this country can never be the subject of a twenty years' possession. If

¹ 25 Q. B. U. C. 334.

² 24 Q. B. U. C. 550; and see *Davis v. Henderson*, 29 Q. B. U. C. 344.

³ *Heyland v. Scott*, 19 C. P. U. C. 172; and see also *Mulholland v. Conklin*, 22 C. P. U. C. 372.

fencing and cultivation can alone constitute a possession, then title to open wood land can never be acquired against the true owner."

Sworn copies of assessments to the land tax will not be conclusive evidence of possession.¹

Heirship.—Where a title is derived through an heir-at-law, it will not only be necessary to prove that the heir was the legitimate son, but also the eldest son of his father; or if the heir-at-law be a daughter, it will be necessary to prove that there was no other child. These facts will be best proved by affidavits of persons who are intimately acquainted with the family.

Bachelorhood.—Where, if the vendor or mortgagor were married, his wife would be entitled to dower, evidence is usually required of his being a bachelor, and may, it would seem, be insisted on:² and wherever in an abstract, the right to dower would attach, a similar enquiry should be made as to the fact of the marriage; and it should be shown, if possible, that the person was not married; or if married, left no widow. If no direct proof can be given of this, the will of the person will be collateral evidence, if it make no mention of a wife, or if he died intestate, it should be shown to whom letters of administration were granted.

Identity.—It will frequently be necessary not only to produce registers of the births, marriages, or deaths of the persons mentioned in the abstract, but also to prove the identity with the persons mentioned in those registers. In such cases, an affidavit of the identity of the party must be made by some competent person.

Payment of Money into Court.—When money is to be paid into court, and it is incumbent that it should be seen that it has been so applied, and there is no subsequent order of the court recognizing the payment, the fact of the payment should be stated from an office copy of the Accountant-General's certificate.³

14. *Payment of Legacies.*—The production of a release of a legacy is evidence of the payment of debts, unless a special pro-

¹ *Ongley v. Chambers*, 1 Bing. 488; *Doe d. Stansbury v. Arkwright*, 2 A. & E. 182; 5 C. & P. 575, S. C.
² See *Power v. Shiel*, 1 Brest. 48.
³ 1 *Pract. Abs.* 190.

viso be inserted in the release for abatement, in case any future demand be substantiated.

Of the Miscellaneous Evidences of Abstracts of Title.

Public Books.—Where a book is of a public nature, and admissible in evidence, an examined copy will be equally admissible. Thus, examined copies of entries in the Bank books, &c., will be admitted as evidence.¹

Parliamentary Surveys.—Parliamentary surveys are deserving of great consideration, particularly if they are executed with accuracy.²

In ascertaining the meaning and effect of a charter, contemporaneous documents, proceedings in causes relating to it, and parol testimony, may be resorted to in order to explain its construction, but not to contradict it.³

Pedigrees.—Pedigrees made at a former period in the absence of other evidence, will prove the facts mentioned in them.⁴ Pedigrees are, however, generally proved by the proper certificates of the births, marriages, and burials of the persons mentioned in them; but in default of these, there are other modes of proving them. Thus, the ancient books of the Herald's Office, and their visitation books of counties, will be admitted as evidence of a pedigree.⁵

Descents in pedigrees are also frequently proved by certificates of marriage, entries in family bibles, engravings on tomb-stones, or other similar evidence, or by the affidavits of persons long acquainted with the family.⁶ So also a verdict, or a statement in a bill in Chancery will be admissible to prove a pedigree.⁷

1 *Marsh v. Colnet*, 2 Esp. N. P. C. 665; *Breton v. Coape*, Peake, N. P. C. 30; *Auriel v. Smith*, 18 Ves. 198, 204; 2 Doug. 672, n (8); *Ree v. King et al.* 2 T. R. 234; *Tuckey v. Flower*, Comb. 187; *Ree v. Heimes*, Comb. 337; *Doe d. Churchwardens of Croydon v. Cook*, 5 E.-p. N. P. C. 221.

2 *Attorney-General v. Hotham*, Turn. 209; but see *Atkins v. Drake*, McClell. & Yo. 213, where it is laid down that evidence afforded by ecclesiastical and parliamentary surveys, either for or against a modus, is entitled to very little weight.

3 *The Governor of the Free School at Luton v. Scarlet and Smith*, 2 Yo. & Jer. 330.

4 *Comp.* 404; 10 East, 120, *Berkley Peasage* case, 4 Camp. 401; 11 East, 604.

5 *King d. Lord Thanes v. Foster*, Jon. 224; *Pitton v. Walter*, 1 Str. 161; *Matthews v. Port*, Comb. 68; *Attorney-General v. Monckton*, L. C. H. T. 1831; *Monckton v. Attorney-General*, 2 R. & M. 147; *Kidney v. Cookburn*, 2 R. & M. 167.

6 *Bull. N. P.* 233.

7 *Taylor v. Cole*, 7 T. R. 3 n. 1; *Whittuck v. Waters*, 4 C. & P. 376.

Witnesses cannot be brought on a question of pedigree to prove the declarations of a relative whose deposition is read.¹ And in a late case it has been held that the declarations of deceased servants and acquaintances, however intimate, are not admissible in evidence in questions of pedigree. Such declaration must be made by relations or members of the family.² However, it has been held that the evidence of a witness was admissible as to what he had heard a deceased physician say as to declarations made by another person who was also dead, in proof of a pedigree.³ And the declarations of the husband or wife of one of the family are admissible for this purpose, although he or she may not otherwise be related to the family.⁴ And declarations by deceased relatives as to particular events happening in a family are clearly admissible, if they are uninterested, and before disputes have arisen.⁵ But mere tradition and current opinion are never admissible.⁶

Family Documents.—Memoranda in old family bibles, old histories and wills, and other family documents, will also be admitted as evidence of the facts they record.⁷ So also inscriptions on tomb-stones, and engravings on rings, in default of better evidence, will be admissible.⁸

Bishop's Registers.—A bishop's register, in England, is evidence of the facts stated in it.⁹

Entries.—Entries made in the books of a corporation or other public body are evidence of the truth of the matters there stated;¹⁰

An attorney's entries of charges for preparing and attending the execution of a deed, and of their having been paid, have been admitted as evidence of the execution of the deed.¹¹

¹ *Gordon v. Gordon*, 3 Swanst. 465.

² *Johnson v. Lawson*, 9 Moo. 183, 8. C.; 2 Bing. 36. See also 13 Ves. 514.

³ 9 Moo. 183, n.

⁴ *Vowles v. Young*, 13 Ves. 140; *Doe d. Northey v. Harvey*, 1 Ry. & Moo. 297; *Futter v. Randall*, 2 Mo. & Pa. 20.

⁵ *Cowp.* 594; 10 East. 120; 13 Ves. 147, 514; *Doe v. Griffin*, 15 East. 298; *Edwards v. Harvey*, *Cowp.* C. C. 30; 4 Camp. 41.

⁶ 13 Ves. 147.

⁷ *Cowp.* 594; 10 East. 120; *Berkley Peerage case*, 4 Camp. 401; *Herbert v. Tuckal*, T. Raym. 84; *Doe d. Johnson v. Earl of Pembroke*, 11 East. 504.

⁸ *Cowp.* 594; 10 East. 120; 13 Ves. 144, 514.

⁹ *Arnold v. Bishop of Bath and Wells*, 5 Bing. 316; *Pulley v. Hilton*, 13 Pri. 625; see *Isham v. Wallace*, 4 Sim. 25.

¹⁰ *Brokes v. Mayor of London*, 1 Str. 307; *Bretton v. Coape*, Peake, N. P. C. 30; *Lynch v. Clarke*, 8 Salk. 154; and see *Rea v. Guin*, 1 Stra. 401.

¹¹ *Warren v. Lord Grenville*, Str. 1129.

Entries will prove themselves, after thirty years have elapsed, as receipts,¹ and entries in the books of a steward of a manor.²

Sworn copies of land tax assessments, although entitled to considerable weight in private transactions, are not direct evidence in a court of justice, of possession.³

Maps.—Maps and plans of estates made a long time back, are, in the absence of other evidence, entitled to considerable credit when the possession has been conformable to them.⁴

Awards.—An award regularly made by an arbitrator, to whom matters in difference are referred, is conclusive on the parties to the reference upon all that is so submitted to him.⁵ The submission of all the parties to the award must be regularly proved.⁶

Where the award is under an act of parliament, the act ought to be produced for the purpose of showing the authority of the commissioners, and that the award is conformable with the statute; and proof that the directions of the act have been complied with must be given.⁷

Certificates.—In producing a certificate from an incorporated society, it will in general be necessary to prove that the seal affixed to it is the genuine seal of the society.⁸

Of Secondary Evidence in Support of Abstracts of Title.

If the documents relating to the title are lost or destroyed, and this can be satisfactorily proved, secondary evidence of them will be admissible. This secondary evidence we shall now consider in detail.

To the admission of secondary evidence, proof of the loss or destruction of the original document is a necessary preliminary.

¹ *Fry v. Wood*, Sel. N. P. 635, n.

² *Winn v. Tyrwhit*, 4 B. & A. 376; and see *Re v. Ryton*, 5 T. R. 259; *Re v. Netherthorpe*, 2 Mau. & Sel. 337; *Re v. Catesby*, 2 B. & C. 814; *Middleton v. Melton*, 10 B. & C. 317; *Doe d. T. v. Tyler*, 4 M. & P. 388.

³ *Ongley v. Chambers*, 1 Bing. 483.

⁴ *Yates v. Harris*, cit. Gib. Ev. 78; *Bridgman v. Jennings*, 1 Lord Raym. 734.

⁵ See *Doe d. Morris v. Rosser*, 3 East, 15; 1 Phill. Ev. 380.

⁶ *Antram v. Chase*, 15 East, 209.

⁷ See 1 Phill. Ev. 400.

⁸ *Chawick v. Bunning*, 1 Ry. & Moo. 306; see further as to this, *Woolrych* on Certificates.

Proof of the destruction more readily lets in the secondary evidence of a copy, than proof of the loss, which must ever be incomplete and exceptionable.¹ Before the secondary evidence can be received the same evidence of their loss and contents must be given as on a hearing in equity, or on a trial at law.

The first step is to show that such a deed once existed.² The next is to show in whose custody it was last seen or known to be, if that can be done; or to show who was the person who was entitled to the custody of it, and having discovered the custody of it, or the proper custody for it, to make search there, and if it cannot be found on diligent search, then secondary evidence may be given.³

The degree of diligence to be used in seeking for an original document, before a party can give secondary evidence of its contents, must depend, in a great measure, upon the circumstances of each particular case. If a paper be of considerable value, or if there be reason to suspect that the party not producing it, has a strong interest which would induce him to withhold it, a very strict examination would properly be required; but if a paper be useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in secondary evidence of its contents.⁴

The point to guard against in this respect is a pledge or deposit of the original document.⁵ Parties searching for a missing deed should remember that the person entitled to the first immediate estate of freehold is entitled to retain the title deeds as against those entitled in remainder or reversion;⁶ and that the deeds are presumed to follow the title and go into the custody of those entitled.⁷

When the lands descend to real representatives, they, and not the personal representatives, are entitled to the deeds, though for greater certainty a search with the latter would be advisable, especially in the case of a missing mortgage.

¹ *Cov. Con. Ev.* 312.

² *Doe d. Padwick v. Whitcomb*, 6 Ex. 600, 4 H. L. 431; *Re Bell*, 3 Chan. Cham. R. 241.

³ *Gordon v. McPhail*, 31 Q. B. U. C. 434.

⁴ *Cov. Con. Ev.* 312.

⁵ *Cov. Con. Ev.* 313.

⁶ *Dillon on Title Deeds*, 25; *Webb v. Lymington*, 1 Eden, 8.

⁷ *Leitch's Real Prop. Stat.* 427.

The presumption that the deeds follow the title may be destroyed as for instance by the fact that they covered other lands retained by the vendor,¹ or that some prior owner on sale of a portion gave a covenant to produce them.

Where the document, if in existence, should be in the possession of the party who desires to give secondary evidence of its contents, the proper course is that he should search with a witness, and that the search should be so conducted, and in such places, as to afford a reasonable ground for concluding that it was made *bona fide*, both as regards the witness and the party, by giving and using all possible facilities to make it effectual.²

Where sufficient evidence has been given of destruction of the original document, or of search and loss to let in secondary evidence, memorials afford, in cases of conveyance, a frequent means of furnishing such evidence, and are admissible or not according to circumstances.

A memorial signed by a grantor, who was not shown to have had more than mere constructive possession by force of the conveyance to him, has been held to be evidence not merely against the grantor, and all claiming under or in privity with him, but also against third persons not appearing to have any title whatever except a bare possession of insufficient duration to confer a title, as being a statement and act by the party in possession against his own interest as reputed owner of the land.³

Though the weight of authority is in favor of taking a memorial executed by a grantor as good secondary evidence even against strangers, without corroborative evidence, it is not clear that this would be so if at the time of the conveyance sought to be proved some one were in possession adversely to the grantor.

Many of the principles whereon a memorial signed by a grantor is admissible as evidence of a conveyance by him, do not apply where it is executed by a grantee.

¹ *Yeo. v. Field*, 2 T. R. 708.

² *Bratt v. Lee*, 7 C. P. U. C. 280.

³ *Russell v. Fraser*, 15 C. P. U. C. 375; but see *Hayball v. Shepherd*, 25 Q. B. U. C. 586.

In the latter case it is a statement, not against, but in support of interest, and by a person not then in possession. But such a memorial, if coupled with other facts confirmatory of the instrument set out in it, is admissible as parcel of the evidence towards proof.

A memorial executed by a grantee through whom a person claims coupled with possession taken under the instrument to which it relates, and enjoyed for a length of time in a mode such as to preclude the possibility of the instrument being other than as set forth by the memorial, is good evidence even against strangers, especially if accompanied by other corroborative facts, but the mere memorial would be evidence only against those claiming under or in privity with the grantee.¹

There seems, however, some danger in allowing mere length of possession and dealing with the property to be sufficient corroborative evidence on which to admit a memorial executed by a grantee as evidence of a conveyance in fee simple absolute. Until the recent Registry Act it was not necessary to set out in a memorial the estate or interest conveyed, and in the case of a conveyance for life, a fraudulent grantee might execute a memorial referring to an instrument granting a fee simple absolute. He might then after destroying the deed, convey in fee, and the property might pass through various hands during his lifetime, and there might thus be possession and dealing with the property for fifty years, consistent with the right of possession and with the conveyance in fee, as set out in the memorial.

The persons entitled in reversion are not supposed to enquire until their right accrues, and when it does they have to contend against evidence offered of the fraudulent memorial and the possession and dealing said to be consistent with it.

The cases when examined, hardly go the length of holding that mere length of possession though for a considerable time under an alleged grant in fee coupled with a memorial executed by the grantee, is sufficient evidence. There are either other facts which lead to the belief of, or are confirmatory of the instrument; or, if

¹ *Gough v. McBride*, 10 C. P. U. C. 166; *Fields v. Livingstone*, 17 C. P. U. C. 15; and see *Re Higgins*, 19 Grant, 308; *Sadler v. Briggs*, 10 Ir. Eq. 532; 4 H. L. 460; *Peyton v. McDermott*, 1 D. & W. 198; *Scully v. Scully*, 10 Ir. Eq. 557.

mere length of possession alone has been considered sufficient, it has been in cases other than on a question of whether the conveyance was in a fee simple absolute to the grantee, and where the possession had been quite inconsistent with the instrument being otherwise than as set out in the memorial.

As between vendor and purchaser, and on proceedings under the Act for Quieting Titles, stricter evidence is required than in ejectment; it is necessary where a party relies on memorials as proof of missing deeds, to show that the deeds contained no trust, limitation condition, exception or qualification not mentioned in the memorial. The execution of a memorial which is receivable in evidence need not be proved when more than thirty years old.¹

Where a foundation is laid by proper search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corroborative circumstances or privity shown, a memorial, though not thirty years old, produced from the Registry Office need not be proved; and a copy certified by the Registrar as such is also admissible without proof of the execution of the original or of the instrument to which the original relates.²

If a petitioner, under the Act of Quieting Titles, intends to use certified copies of memorials as evidence, he must also procure and produce certified copies of the affidavits of execution.

With respect to copies generally, it is to be observed that a copy of a copy is not evidence, for the Courts require the best evidence the nature of the thing admits, and the further off anything lies from the first original truth, the weaker must be the evidence; besides there must be a chasm in proof; for it cannot appear that the first was a true copy.³

Voluntary Affidavits.—Voluntary affidavits are frequently resorted to, and required by conveyancers under a choice of difficulties, in support of facts and averments, when more direct proof cannot be obtained.⁴ These documents, though possessing no legal

¹ *Doe Macklem v. Turnbull*, 5 Q. B. U. C. 119.

² *Marvin v. Hales*, 6 C. P. U. C. 211; *Lynch v. O'Hara*, 6 C. P. U. C. 267; *see also Prince v. Girty*, 9 Q. B. U. C. 41.

³ *Con. Con. Ev.* §18.

⁴ *Con. Con. Ev.* §19.

validity, are often all the evidence that can be adduced; and as it were by general consent the profession adopt them as evidence upon titles.¹

As legal evidence, such affidavits are clearly inadmissible; they are purely voluntary, and not being made in Court in any cause, they will not sustain an action for perjury; then they are made expressly to support some point, and are, therefore, on the face of them not of that pure and disinterested character which is expected from unexceptionable evidence; and they frequently contain nothing more than hearsay evidence: yet the conveyancer admits this testimony as corroborative evidence of general reputation and concurrent possession.²

It should always appear on the face of the affidavit that the deponent is likely to be acquainted with the facts, and reasonable grounds for his belief should be stated.³

Recitals.—Recitals or statements contained in acts of Parliament and in deeds, decrees, and other instruments, furnish very important secondary evidence.

A recital is rather an interested witness, for it is seldom if ever made with the knowledge and concurrence of parties having an adverse title; it is a tale told by the party whose interest it is to support the deed, and, therefore, is not of that unprejudiced character which other evidence preserved without reference to any particular transaction is impressed with.⁴

The general rule acted upon by conveyancers has been, that recitals and statements contained in deeds thirty years old or upwards may be considered as good secondary evidence, and where the facts recited are not very important, a purchaser may rest satisfied with such recitals without further evidence, even if contained in deeds of more recent date.⁵

¹ *Lee* on Abs. 215; *Hubback* on Suc. 66.

² As to evidence of general reputation in question of title, see *Morswood v. Wood*, 14 East, 327; *Dunraven v. Llewellyn*, 15 Q. B. 791; *Weeks v. Spark*, 1 M. & S. 679; *Rex v. Anirobus*, 2 A. & E. 788; *Pim v. Curell*, 16 M. & W. 284; *Williams v. Morgan*, 15 Q. B. 782; *Doc d. Didsbury v. Thomas*, 14 East, 323; *Re Bell*, 3 Chan. Cham. R. 247.

³ *Cov. Con. Ev.* 319; *Re Harding*, 3 Chan. Cham. R. 233.

⁴ *Cov. Con. Ev.* 296; *Lee* on Abs. 364.

⁵ *Lee* on Abs. 360; *Cov. Con. Ev.* 298.

Among the recitals deemed of minor importance, may be mentioned such as relate to facts corroborated in part by other evidence, recitals of deaths, burials, marriages, births or baptisms; the number of children in a family, the failure of issue, or as to one person having survived another, or that one was the executor or administrator of another, and as to the occupancy, identity or boundary of lands.¹

Where the facts are very important, a purchaser should not rely on the recitals even of an old deed; especially if better proof aliunde can be obtained. Thus it has been decided, that it is not sufficient to prove an important descent in a pedigree, for the vendor to set forth deeds which recite the pedigree, although the deeds are upwards of thirty years old.²

Recitals as to the contents of deeds are more to be depended upon, than recitals as to pedigrees. Parties may themselves, without any fraudulent intention, mistake a pedigree, the latter, therefore, require to be more narrowly searched into.³ A deed can seldom be incorrectly recited, unless through fraud or otherwise intentionally, much, therefore, depends on the nature of the recital, as well as its antiquity.⁴

The value of the statements and recitals respecting pedigrees in old deeds, depends entirely on the circumstance whether possession has accompanied the deed containing the recital. If the deed itself be not sanctioned by the acquiescence of parties, privies and strangers, the recitals in it are not entitled to much weight.⁵ Nevertheless if there be no apparent motive for misrepresentation, and the recital is borne out by forty years' undisturbed possession, the conveyancers usually give credence to the statement.⁶

Recitals often have the effect of controlling the operation of a deed, as more clearly expressing the intention of the parties. But recitals cannot be allowed to restrain the operation of words in a deed where those words are of plain as well as known import.

Recitals in deeds cannot alone be taken as evidence against strangers or others not parties to the deed containing such recitals.

¹ *Lee* on Abs. 360, 361; *Cov. Con. Ev.* 299.

² *Staney v. Wade*, 1 M. & Cr. 358; *Port v. Clark*, 1 Russ. 601; *Anon*, 12 Mod. 384.

³ *Lee* on Abs. 361; *Cov. Con. Ev.* 300.

⁴ *Ibid.*

⁵ *Cov. Con. Ev.* 300.

⁶ *Ibid.*, 299, 301.

If it was otherwise, nothing would be easier than to insert recitals as the foundation of a good prior title; thus a man might in a post-nuptial marriage settlement insert a recital of ante-nuptial articles which never existed, and so defraud his creditors contrary to the 13 Eliz. ch. 5.

Recitals are always taken as admissions of those who are parties to the deed and interested in the property. Thus¹ where a recital occurred in a deed of settlement that the owner of the property had given a bond to another party, which bond was not produced as the execution of it could not be proved, the recital was held to be evidence of the bond having been executed.²

But although a recital may be evidence as against parties executing the deed containing the recital of the prior instrument, yet there ought to be some further proof to establish entirely the execution and validity of the recited deed;³ a bare recital of a deed, it has been said, is not evidence; but where there are other facts, (such as entries in a solicitor's books of charges for procuring the execution of the deed), which corroborate the recitals,⁴ or where there is other evidence that the instrument recited existed, then the recital may be taken not only as evidence of the existence, but (as against the parties to the deed containing the recital), as evidence of the execution of the recited instrument.⁵

It appears, therefore, that although recitals may be good secondary evidence of deeds which are shown to have existed but which have been lost or destroyed, yet the rule cannot be extended to those cases in which nothing is known as to the deeds to which the recitals relate.⁶

Recitals in a deed prepared by direction of a Court of Equity and settled by a Judge or a Master, are more to be relied on than other deeds, in consequence of the strictness with which facts and statements are required to be verified in the Master's office.⁷

¹ *Battersbee v. Farrington*, 1 Swanst. 113.

² *Annandale v. Harris*, 2 P. Wms. 434.

³ *Ford v. Lord Grey*, 6 Mod. 45.

⁴ *Skipwith v. Shirley*, 11 Ves. 64.

⁵ *Burnet v. Lynch*, 5 B. & C. 601.

⁶ See on Abs. 363.

⁷ See on Abs. 363. See *Roe v. McNeil*, 1 U. C. L. J. N. S. 111, as to the effect of improper recitals in a Sheriff's deed.

Notwithstanding the fact that recitals afford such evidence of prior deeds, yet in regard to the consequences of that evidence, or the notice given by them to purchasers, it is considered that such notice does not entitle a purchaser to demand an abstract of the deeds themselves, although it may entitle him to require the inspection of such recited deeds, if in the custody or power of the vendor, when they bear strongly upon the title.¹

Presumptions.—In the absence of all direct evidence, presumption may, after a great lapse of time, aided by other corroborative facts, such as uninterrupted enjoyment for a length of time and acquiescence, or apparent acquiescence, of those whose claims are adverse, be relied on, particularly where the importance of the fact is inconsiderable.² Thus possession is *prima facie* evidence of property, but the landlord may prove that the occupier is his tenant by shewing a payment of rent or other acknowledgment.³

In the case of births and marriages many facts may be adduced in support of the presumption of one from circumstances in connection with the other; for instance, the birth or baptism of a child being proved, gives much weight to the presumption of a marriage between the parties whose child it is stated to be. Proof of a marriage prior to the time of the birth of a child affords grounds for presuming that such child is the issue of the parties so married, if the mother be known; and where a birth is proved a short time only after the marriage, the possibility that it is the eldest child of that marriage amounts almost to certainty.⁴

In regard to marriages there are many grounds for raising a presumption of marriage in the absence of direct evidence of the fact. The parties having always lived together as man and wife, and having in common reputation been received by their friends and passed as such; children being described as the children of A. and B. his wife; their so styling themselves in wills; and other matters less important than these, if ancient in date, have been allowed to raise the presumption of marriage in common cases.⁵

¹ *Lee* on Abs. 364.

² *Lee* on Abs. 464.

³ *Cov. Con. Ev.* 320.

⁴ *Lee* on Abs. 464.

⁵ *Lee* on Abs. 465; *Baker v. Wilson*, 3 Grant, 376; and see *Doe d. Wheeler v. McWilliams*, 2 U. C. Q. B. 77; 3 U. C. Q. B. 165.

It is found by common experience to be a necessary presumption that a person of the same name and conveying the same interest as that limited to a person previously mentioned, is the same person. Unless there is a great interval between any two deeds, evidence of identity is seldom called for; if such a chasm exist it may be proper to require evidence of the occupation in the interval. But where a deed was executed in a foreign country, during the progress of an investigation for quieting a title, for the purpose of removing a blot on the title, satisfactory evidence of identity and execution were required.¹ The dangers to which accepting such a deed on its production without evidence of its validity, would expose absent parties are obvious.

The law never makes a presumption that acts are wrongly done, or that fraud has been committed, unless there is good ground for believing such to be the fact; presumptions, if made where nothing is known, are always that things were rightly done, or in favour of order and regularity.²

In the absence of all proof or knowledge of facts there can be no presumption except what the law itself points out. In some cases an inference may be made from nothing being known to the contrary for a series of years.

In any case of alleged quiet possession or of no claims made, there can be no presumption where there is no knowledge, except such as can be drawn from acquiescence, or apparent acquiescence, in the title of the party in possession; thus where no adverse claim has been heard of for a length of time, quiet possession may be inferred or presumed.³

It is the practice of Courts of Law, where a person has not been heard of for a number of years, to presume his death after seven years, but a seven years' absence without tidings is not sufficient to raise this presumption with conveyancers⁴ Every case must depend on its own particular circumstances, and no certain period can be fixed which will raise the presumption. It has been admitted by Courts of Equity after twenty years, in one case after

¹ *Re Hay*, 29 Jan. 1860.

³ *Lee on Abs.* 466.

² *Lee on Abs.* 465; *Conv. Con. Ev.* 819.

⁴ *Dart on Vendors*, 815.

fourteen years, but in a recent case after absence and silence of nineteen years, the Court refused to presume death where the circumstances rendered it improbable that the party, if alive, would have communicated with his friends.¹ Where a man who was absent in British Columbia for several years, corresponding regularly with his family, wrote that he intended leaving about a certain day to return home, and was never afterwards heard from, evidence having been given that about the time mentioned in his letter he was seen at San Francisco to go on board the steamer Golden Gate, which was on the same voyage lost off the Coast of Mexico, his name appearing in the list of passengers returned to the company with the word "lost" written after it, and diligent enquiry having been made for him without success, death was, in a proceeding under the act for Quieting Titles, presumed after nine years.² Scarcely any length of time will be sufficient to compel an unwilling purchaser to take a title depending on such a presumption of death, unless made with reference to the age of the party said to be dead; and if the party whose death is asserted was, when last heard of, very young, the period must be that beyond which human life does not commonly extend.³ If the presumption to be made is, death without issue, it is doubtful if a court would as against a purchaser ever make the presumption within the period of sixty years.⁴

Copies, Drafts, and Abstracts.—When a deed or will has been lost, and diligent search is proved to have been made in the proper places of the proper persons,⁵ and the subsequent enjoyment has been consistent with its alleged contents, a counterpart,⁶ an ancient copy,⁷ and *a fortiori*, an old attested copy,⁸ or a copy enrolled for safe custody,⁹ the rough draft of a release, especially if the original bargain and sale for a year be forthcoming,¹⁰ an old abstract,¹¹ particularly when it appears to have been pursued by professional per-

1 *Bowden v. Henderson*, 2 Sm. & G. 360.

2 *Re Harris*, 1872.

3 *See on Abs.* 466.

4 *Ibid*, 467.

5 *See* 2 Vef. 90. As to what will be held to be reasonable diligence in such a case, see *Re v. East Farleigh*, 6 Dow. & Ry. 147; *Macdougall v. Hogarth*, 8 Bll. 41; *Bligh v. Wellesley*, 1 Car & Pay. 400. The decree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of each case. *Gully v. Bishop of Exeter*, 4 Bing. 290; and see *Lorton v. Gore*, 1 Dow. N. S. 190; *Re v. Inhabitants of Stourbridge*, 3 B. & C. 86; 2 Man. & Ry. 43.

6 *Anon.* 6 Mod. 225; 1 Lev. 25.

7 *Lady Grijin v. Boynton*, Nels. 82; *Medlicot v. Joyner*, 1 Mod. 4; 2 Atk. 72.

8 *Harvey v. Phillips*, 2 Atk. 541.

9 *H—t's case*, 11 Mod. 109; *Combes v. Spencer*, 3 Vern. 471.

10 *Whitfield v. Fausset*, 1 Ves. 389; *Ward v. Garnone*, 17 Ves. 134.

11 Bull N. P.

sons, and that objections to the title have been made and answered,¹ will all be admitted as evidence of its contents;² nor will the force of such evidence be destroyed by the fact that unexecuted engrossment of the deed in question has been discovered;³ as the engrossment might have been lost or mislaid by accident; and in default of such testimony, parole evidence will sometimes be admissible,⁴ particularly where there has been a wilful destruction of the instrument by the opposite party.⁵ But an affidavit of the vendor will not be sufficient.⁶

In certain cases copies of documents are sufficient evidence of them, without producing the originals. Thus by the 3rd & 4th Ed. VI. ch. 4,⁷ patentees and persons claiming under them may make title in pleading, by showing forth an exemplification of the enrolment of the letters patent, as if the letters patent themselves were pleaded and shewn forth. By the 10th Anne, ch. 8,⁸ it is provided, that where the original is wanting, the party pleading may show forth and produce a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer, and proved upon oath to be a true copy, shall be of the same force and effect as the indenture of bargain and sale would be, if produced. By the 8 Geo. II. ch. 6,⁹ all persons having or claiming title to any lands, &c., in the North Riding of Yorkshire, may register at full length all deeds, writings wills, and conveyances, under which such title shall be claimed; and all copies of such enrolments of such deeds, &c., signed by the registrar or his deputy, shall be good evidence of such deeds, &c., destroyed by fire or other accident. And by the 7th Geo. IV. ch. 57, petitions, schedules, assignments, and other proceedings respecting insolvent debtors, are proved by copies purporting to be signed by the proper officer, and under the seal of the court.

It may be noticed here that the memorial of a registered deed unless it contains the deed verbatim, (which before the act of

¹ *Ward v. Garnons*, 17 Ves. 134.

³ *Skignith v. Shirley*, 11 Ves. 64.

⁴ 10 Co. 92 b.; *Villiers v. Villiers*, 2 Atk. 71; and see *Waller v. Horsface*, 1 Camp. 501.

⁵ *Gartside v. Ratcliffe*, 1 Ch. Ca. 292; *Delaney v. Tenison*, 3 B. P. C. 659; *Dalston v. Coatsworth*, 1 P. Wms. 731; *Medlicot v. Joyner*, 1 Mod. 4; *Rez v. Sir T. Culpepper*, Skin. 673; *Robinson v. Davis*, 1 Str. 526.

⁶ *Re Chamberlain*, 2 Cham. R. 352; *Re Bell*, 3 Cham. R. 239.

⁷ Explained by 13 Eliz. ch. 6.

⁸ Sec. 3.

² See *Matt.* on Pres. 197.

⁹ Sec. 22.

1865,¹ it rarely did,) is not alone sufficient evidence of the contents, as the law required in memorials, only the date of the instrument, the names and additions of the parties to it, the names and additions of the witnesses, and their places of abode; the lands contained in it, and the City, Town, Township or place in County or Riding, where the lands are situate in the manner in which the same are described in the instrument or to the like effect;² and the deed may therefore have contained important particulars not noticed in the memorial, such as a proviso for redemption, a trust and other various exceptions and qualifications.

Copies also which are examined with the originals, and which are sworn to be true copies, are admissible in many cases, although there be no proper officer appointed to make them, if the removal of the original would be attended with difficulty or danger. Thus copies of the journals of the houses of parliament,³ or of the transfer books of the East India or other public Company, will be admitted as evidence, if the originals are admissible.⁴

Extracts.—Extracts from documents of a doubtful character, cannot be received as evidence. The original must be produced, that the court may judge by inspection of the admissibility even of the document itself.⁵

Recitals.—In modern transactions recitals are not to be relied on, except so far as they are evidence in themselves by way of estoppel; but so far as they state other independent evidence, as letters of administration, probate and deeds, between third parties, &c., the letters of administration, deeds, &c., must themselves be produced.⁶

But recitals of births, survivorships, &c., in old deeds, are very frequently admitted in evidence, particularly where the transaction is not very important, and the expense of furnishing the best evidence would be considerable; and it may be said to be the constant practice of conveyancers, on the examination of titles, to receive as

¹ 29 Vic. ch. 24.

⁴ Con. Stat. U. C. ch. 89, sec. 19.

³ *Jones v. Randal*, Cowp. 17; *Birt v. Barton*, Doug. 166; *Rez v. Lord Gordon*, Doug. 500.

⁴ *Rez v. Gordon*, Doug. 509; *Lynche v. Clarke*, 3 Salk. 134.

⁵ *Woolley v. Broomhill*, 13 Pri. 500.

⁶ 3 *Prest.* Abw. 230.

evidence recitals of thirty or forty years back, if the possession has been according to them, and there are corroborative instances strengthening the presumption that the facts were according to such recitals.¹ And if the deeds themselves are destroyed, recitals of them in other deeds will be admitted as evidence.² And as to a particular fact, they will operate by estoppel, although they will not have this operation as to a general statement.³ In a later case,⁴ where a vendor insisted that he was not bound to establish by extrinsic testimony the truth of recitals in deeds of 1793, Lord Gifford, M. R., was of opinion, that these recitals, whatever effect they might have between the parties to the deeds, could not, as against third persons, be any evidence of the facts recited in them. If evidence had been given that possession had followed and accompanied the matters therein recited, that enjoyment would have been a strong circumstance to prove that the facts actually were as they were stated; but there was not the slightest proof of any possession from 1737 to 1793 in those through whom the title was traced.⁵ And where the rights of creditors are concerned, recitals in a deed of 1793 will be held to be no evidence.⁶

Although letters patent under the great seal are of the highest authenticity,⁷ yet recitals, in such letters, of facts which will admit of higher proof, will not be admitted in evidence, unless the grant be founded upon such recital, as the consideration for the grant.⁸

In proceeding on the abstract the Master will bear in mind that he is to certify on two points,—one being whether or not the vendor can make a good title, and the other at what time he had shown a good title—this latter enquiry is necessary in order to guide the Court as to the cost of the reference. A vendor does not shew a good title by producing and furnishing to the purchaser an abstract showing on the face of it a good title: he does so only when he verifies such abstract.⁹

¹ *Cordwell v. Mackrill*, Amb. 515.

² *Ford v. Gray*, 1 Salk. 285; *Anon.* 12 Vin. Ab. 223, pl. 15; Comb. 341; 6 Moo. 44; *Marchioness of Annandale v. Harris*, 2 P. Wms. 432; Cowp. 595; *Skipwith v. Shirley*, 11 Ves. 64; *Edwards v. Brown*, 1 Cro. & Jer. 307.

³ *Shelley v. Wright*, Willes, 9; *Rces v. Lloyd*, Wightw. 123; *Holmes v. Aitshie*, 1 Madd. 551.

⁴ *Fort v. Clarke*, 1 Russ. 601.

⁵ See also *Prosser v. Watts*, 6 Madd. 59.

⁶ *Batterabee v. Farrington*, 1 Swanst. 106.

⁷ 3 Inst. 173; *Page's case*, 5 Co. 53; *Gibb. Ev.* 14.

⁸ 2 Roll. Ab. 678, 731; *Montague v. Preston*, 2 Vent. 170; and see *Cragg v. Duke of Norfolk*, 2 Lev. 108, and as to recitals in a Justice's order, see *Rex v. Gildes*, 5 B. & C. 439.

⁹ *Granger v. Latha*, 14 Grant, 209.

Order 391 provides that "The Master is to determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, he may permit the purchaser to supply defects therein at the vendor's expense." And Order 392 that "The Master is not to make a report on the abstract, but is to mark the objections as 'allowed,' or 'disallowed,' as the case may be; and when he finds the abstract perfect, or as perfect as the vendor can make it, he is to certify to that effect at the foot, or on the back; and such finding is to be final unless appealed from within fourteen days thereafter." Where a reference is made to the Master as to title, and objections are brought in thereto, the Master is not warranted in making a report either for or against the title; his proper course is to mark each objection "allowed" or "disallowed," as the case may be.¹

In case of difficulty the master may direct the abstract to be laid before conveyancing counsel, upon whose opinion he exercises his own judgment in reporting on it. In such cases the abstract with the requisitions and objections and answers, with a copy of the order of reference with instructions "to advise on the title by the direction of the Master," are taken by the solicitor and laid before counsel, and when he has given his opinion thereon the papers are returned to the Master's office. The counsel fee in such case must be paid by the party conducting the reference, and will be dealt with eventually as part of his costs.

A prior deed through which the title comes to the vendor having been executed by the attorney of the grantor does not render the title invalid, or such as a purchaser will not be bound to accept.²

In case of a registered title, a purchaser is, in this country entitled to require the registration by his vendor of all the instruments through which the title is derived. On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the Court, it is not usually necessary to prove the execution of deeds produced. Affidavits are admissible for some purposes on such an investigation; where, however, an affidavit was offered to prove the

¹ *Cockenou v. Bullock*, 12 Grant, 73.

² *Farrell v. Moore*, 1 Chan. Rep. 139.

loss of a will which had been proved in a Surrogate Court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser should he be compelled to accept the title, the affidavit was held insufficient evidence.¹

Where the purchaser of mortgaged premises had forfeited his title thereto by means of a conveyance from the mortgagee, who had obtained a final order of foreclosure and it was sought by the mortgagor to impeach the title of such purchaser by reason of irregularities in the foreclosure proceedings, of which, however, it was not shown that the purchaser was aware; but the decree and final order on the face of them were regular: *Held*, that the purchaser was not bound to inquire into the regularity of proceedings upon which the decree and final order were founded, and dismissed the bill with costs.² On receiving an abstract of title, the purchaser has seven days within which to object to the completeness of the abstract, and after any question of its completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days to object to the title; if, however, he takes his objection to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title. No objections other than those specifically taken will be entertained by the Master. The endorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before the late Registry Act.³

The Master having concluded the reference, and marked the abstract and objections, his findings become final unless appealed from within fourteen days. Order 393 provides that "after an abstract is confirmed, or is accepted by the purchaser as sufficient, no objection to the abstract is to be allowed."

It will be observed that the orders 390, 391, 392 and 393, relate only to the frame of the abstract. So far it is considered in the light of a declaration at law, and the objections or requisitions as a demurrer. The first step is to obtain from the Master his deci-

¹ *Brady v. Walls*, 17 Grant, 699.

² *Gunn v. Doble*, 15 Grant, 665.

³ *McManus v. Little*, 3 Cham. Rep. 263.

sion as to the sufficiency of the statements made in the abstract, and his disallowance of all or any portion of the objections means merely that if the vendor can establish all he alleges in it, the title will be considered good. In the event of his allowing the whole abstract, an opportunity is given to the purchaser to test the accuracy of his conclusions by an appeal, and for this purpose the abstract is to remain in his office for fourteen days; if within that period the purchaser appeals, the abstract and objections are transmitted to Toronto, where the matter is argued on the appeal. If on the other hand the Master should allow all or any portion of the objections, the vendor may either yield to his opinion and amend the abstract (if he be able) or he may appeal. In such a case the appeal must be made within fourteen days after the Master has given his decision, and the case is argued on the appeal in Court. The orders 394, 395 and 396, apply to the proof of the statements in the abstracts, or in other words, to its verification.

Order 394 provides that "after acceptance or confirmation of the abstract, the verification is to be proceeded with, and the vendor is with all diligence to afford the purchaser all the means of verification in his power, in the manner, and according to the practice usual with conveyancers; and after having done so he may serve a notice on the purchaser to make his objections or requisitions, if any, within seven days, or that otherwise he will be deemed to have accepted the title." And order 395, that "upon being served with such notice, the purchaser, if dissatisfied, is to serve his objections or requisitions within the time thereby limited; and the like course is to be followed upon such objections or requisitions as is prescribed by orders 390, 391 and 392 in relation to the abstract. The object of these orders is to simplify the proceedings and save expense. Every opportunity is afforded for the parties to agree upon the title without a reference to the Master, but if they cannot agree then either party may take the matter into the Master's office in the manner described in order 390. The mode of verifying the abstract has already been pointed out.

It may here be mentioned that if on appeal the Court should think the abstract defective, the vendor will be ordered within a

certain time to amend it, and in default, that the purchaser be released from his purchase. Or, if in attempting to verify it, he fail, the Court will also release the purchaser. Or, if the vendee be anxious to carry out his purchase he may proceed to verify the abstract at the vendor's expense, on obtaining the Master's authority for the purpose.

Order 396 provides that "In case of the refusal or neglect of the vendor to verify any portion of the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense."

Order 397 provides that "the foregoing orders, 390, 391, 392, 393, 394, 395 and 396, are to apply to all cases of reference to the Master as to title, as well as to sales by the Court."

The practice created by these orders is very different from that in England, and there are but few decisions in our own Court relating to them. It will be observed that the Court encourages the parties to agree upon the title before resort is had to the Master's office; first, when the abstract is delivered and before any attempt is made to authenticate it, and secondly, after the abstract is confirmed, and its proof is attempted. If the abstract is objected to brought into the Master's office, upheld by him, and subsequently by the Court on appeal, the vendor must then, under order 394, endeavour to satisfy the purchaser by affording him all the means of verification in his power; if, however, he fails in this, the abstract must again be proceeded on in the Master's office in the manner already pointed out; if it be there established to the satisfaction of the Master, but is appealed from, and the Master's findings are upheld, the purchaser must then complete his purchase. If, however, the vendor fails either in furnishing a proper abstract, or in authenticating it, the purchaser becomes entitled to be relieved from his purchase. But though the Master report against the title, the purchaser will not be discharged if the title can be made good within a reasonable time,¹ The Master should report unconditionally whether the title be good or not; it would be improper to

¹ *Chamberlain v. Lee*, 10 Blm. 444; *Coffin v. Cooper*, 14 Ves 205; *Sidebotham v. Barrington*, 4 Beav. 110.

report that a good title could be made subject to the performance of certain conditions, or with the concurrence of a third party.¹ Where a report allowing the title is appealed against, and the appeal is dismissed the title cannot be further objected to. If, however, the appeal is allowed, further objections may be made on the delivery of a fresh abstract.² But even though the Master report in favor of the title, if on appeal the Court think it too doubtful to force on a purchaser they may dismiss the bill.³ Where on an appeal from the report allowing the title the Court is dissatisfied with evidence of a fact which had satisfied the Master, they will refer it back, the vendor offering to procure additional evidence.⁴ A purchaser of an entire estate divided into shares, the title to one of which is defective, cannot be compelled to accept the remaining shares.⁵

The purchaser is entitled to his costs of the inquiry, where the title is found to be good on grounds not appearing on the abstract;⁶ and where it is found to be good on grounds appearing on the abstract, he will not be ordered to pay the vendor's costs of the inquiry,⁷ unless his objections are frivolous and vexatious.⁸

If the title prove on the inquiry to be bad or doubtful,⁹ the purchaser is entitled to be discharged from his purchase, and to have his deposit, if any, returned, and to be paid his costs, charges, and expenses occasioned by his bidding for and being allowed the purchaser of the property, and of and incident to his application to be discharged.¹⁰ unless he is precluded therefrom by the conditions of sale.¹¹ If there is any fund in Court standing to the credit of the cause, the purchaser's costs, charges, and expenses will be ordered to be taxed and paid out of it;¹² but if there is no

1 *Magennis v. Fallon*, 2 Mol. 561, 575, 583; *Lewis v. Loazan*, 1 Mer. 179.

2 *Brook v. —*, 4 Mad. 212.

3 *Robinson v. Milner*, 1 Hare, 578, n.; *Willcox v. Bellaers*, T. & R. 491.

4 *Andrew v. Andrew*, 3 Sim. 890.

5 *Hurd v. Robertson*, 5 U. C. L. J. 67.

6 *Fielder v. Higginson*, 3 V. & B. 142.

7 See *Camden v. Benson*, 1 Keen, 671, as explained in *Flower v. Hartopp*, 8 Beav. 300.

8 *Thorpe v. Freer*, 4 Mad. 406; *Peers v. Sneyd*, 17 Beav. 151; and see *Morgan & Davey*, 270, *et seq.*

9 See, as to grounds for rescinding a contract, *Sug. V. & P.* 39, 66, 242—256, 371; *Dart.* 101-103, 289;

1 *Davidson*, 459, 552; 1 *Prideaux*, 50; and cases collected there.

10 See *Attorney-General v. Corporation of Newark*, 8 Sim. 71. For form of order, see *Seton*, 1208.

11 *Falkner v. Equitable Reversionary Society*, 4 Drew. 352; 4 Jur. N. S. 1214; *Wards v. Dickson*, 7

W. R. 148, V. C. K.; *Sug. V. & P.* 39.

12 *Reynolds v. Blake*, 2 S. & S. 117; *Attorney-General v. Corporation of Newark*, 8 Sim. 71; *Perkins v. Ede*, 16 Beav. 268; see *Seton*, 1209; and see *Ward v. Trathen*, 14 Sim. 82; *Calsert v. Godfrey*, 6 Beav. 97, 110; *Lachlan v. Reynolds*, Kay, 52.

such fund, the costs will be ordered to be paid by the plaintiff, without prejudice to the question how such costs shall be ultimately satisfied or borne ;¹ and the plaintiff will be entitled to recover them as part of his costs of suit.²

Where the purchase is inequitable, the purchaser may, on submitting to forfeit his deposit, if any, be discharged from his purchase.³ Thus, in *Savile v. Savile*,⁴ a purchaser at a sale under the Court, which took place about the time of the South Sea bubble, was, on submitting to forfeit his deposit, discharged from his purchase, on the ground of the exorbitance of the price. It is now fully established, however, that mere exorbitance of price will not be, of itself, a sufficient ground to release a purchaser from his contract, even upon the terms of forfeiting a deposit. Where, however, the purchaser has, by mistake, given an unreasonable price for an estate, the Court will, in a proper case, wholly rescind the contract.⁵

A purchaser has also been discharged where, before conveyance, it was discovered that a will was incorrectly abstracted, and the title bad : although he had accepted the title, and paid his purchase money into Court ; and so also, where the party conducting the sale had been guilty of misrepresentation,⁶ and where a purchaser was induced to enter into a contract on the faith of a statement, untruly made by the solicitor conducting the sale, that a good title could be made to the property, he was discharged out of custody, under an attachment for non-payment of the purchase money, and the contract was rescinded.⁷

Where, however, the solicitor in the cause, without authority interfered in a sale and bid, although he did it to prevent the property being sold at an undervalue, the Court would not release him.⁸

¹ *Smith v. Nelson*, 2 S. & S. 567.

² *Berry v. Johnson*, 2 Y. & C. Ex. 564.

³ *Sug. V. & P.* 119.

⁴ 1 P. Wms. 745.

⁵ *Morhead v. Frederick*, cited *Sug. V. & P.* 120, 814.

⁶ *Lachlan v. Reynolds*, Kay, 52; see also *Calvert v. Godfrey*, 6 Beav. 97, 106, 110 ; *Grissell v. Peto*, 2 Sm. & G. 89.

⁷ *Bromage v. Davies*, 4 Jur. N. S. 688, V. C. S.

⁸ *Nelthorpe v. Pennyman*, 14 Ves. 517.

The application by a purchaser to be discharged in these cases is made by motion, notice of which must be served on the parties to the cause.¹

Where the purchase money of any purchaser who is entitled to be discharged, or any part thereof, has been paid into Court, it will be ordered to be repaid to him, if still in cash. If it has been invested on his own application, he must take the amount of the stock, notwithstanding any variation in the price;² but if the investment has been made on the application of any of the parties to the suit, the purchaser is, it would seem, entitled to the sum which he paid in.³

The former purchaser must be discharged, before the Court can give effect to a resale of the property,⁴

Several purchasers may join in one application for an order for payment of their purchase monies; but the different amounts must be kept separate.⁵ Where two or more persons purchase one lot, the money must be paid in in one sum, for the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue.⁶

Only the solicitor conducting the sale, (who acts for all the parties,) is entitled to appear on the application to pay in the purchase money; and he must take care that the amount to be paid in, including any interest or valuations, and the time when possession is sought are correctly stated.

It is clearly the rule that, on a special case, as where a purchaser is entitled to relieve himself from paying interest, the Court will receive the purchase money, on the application of the purchaser, without his accepting the title;⁷ but, in such case, he will not be permitted to take possession of the property, till he accepts the title.⁸

1 *Sherwood v. Beverage*, 3 De G. & S. 425.

2 *Hodder v. Ruffin*, cited *Sup. V. & P.* 119; and see *Tompsett v. Wickens*, 3 Sm. & G. 171; 2 Jur. N. S. 10.

3 See *Humphries v. Horne*, 3 Haro, 278, 279.

4 *Williams v. Wace*, C. P. Coop. 42; 1 C. P. Coop. t. Cott. 379.

5 *Seton*, 1195.

6 *Darkin v. Marye*, 1 Anst. 22.

7 Per Lord Cottenham in *De Visne v. De Visne*, 1 McN. & G. 344; and see *Barker v. Harper*, G. Coop. 32; *Hutton v. Mansell*, 2 Beav. 260; *Hindle v. Dakin*, 1 C. P. Coop. t. Cott. 378; C. P. Coop. 381; *Dempsey v. Dempsey*, 1 De G. & S. 691; *Morris v. Bull*, 1 De G. & S. 691; 11 Jur. 4, n. (a.); *Ousley v. Anstruther*, 11 Beav. 399; *Rudley v. Gill*, 3 De G. & S. 640; but see *Dwining v. Henderson*, 1 De G. & S. 689; 11 Jur. 627; *Rutter v. Marriott*, 10 Beav. 53.

8 *Hutton v. Mansell*, and *Dempsey v. Dempsey*, De G. & S. 691.

The application to pay in without prejudice may be made by motion, notice of which must be served on the solicitor conducting the sale; and should ask merely for leave to pay in the money without prejudice to any question as to the title to the property, and that the money may not be paid out without notice to him. When he is prepared to accept the title, he should apply again by motion, notice of which must be served in like manner, for an order to let him into possession, or receipt of the rents, and for the execution of a conveyance to him by all proper parties.

A purchaser of a freehold estate is not entitled to the rents, for a period anterior to the quarter day preceding the payment of his money, merely because he has been ready to complete his purchase, and has had his money lying idle in his banker's hands; for he might have applied to pay the money into Court, without prejudice to his objections to the title, when it would have been invested.¹ If a purchaser enters into possession of the estate without the sanction of the Court, he will be considered to have accepted the title, and be compelled to pay the money into Court at once;² although he entered with the permission of the parties the cause; the Court only can give such permission.³ A purchaser of a reversionary interest will be ordered to pay interest on his purchase money from the time of his purchase.⁴ In the case of the sale of a life interest in the public funds, the purchaser is liable to interest from the time of the contract, and is entitled to the next dividend which becomes due after the sale, even if it be the following day.⁵ On the sale of an annuity, secured by deed and payable quarterly, a different rule appears to prevail, for there the purchaser is considered as entitled to the annuity from the day on which the certificate of the result of the sale becomes binding, he paying interest from that day.⁶

Where the purchaser buys subject to an existing tenancy, it is usual for him, on completing his purchase, to obtain from the solicitor conducting the sale, a letter to the tenant, informing him that

¹ *Barker v. Harper*, G. Coop. 32.

² *Wilding v. Andrews*, 1 C. P. Coop. t. Cott. 380.

³ *Ibid.*; Sug. V. & P. 105.

⁴ *Trefusis v. Lord Clinton*, 2 Sim. 359; and see *Wallis v. Sarel*, 5 De G. & S. 429; *Bailey v. Collett*, 18 Beav. 179.

⁵ *Anson v. Towgood*, 1 J. & W. 637.

⁶ *Twigg v. Fildes*, 13 Ves. 517; and see *Vesey v. Blwood*, 3 Dr. & War. 74.

the property has been sold to the purchaser, and that the latter is entitled to the rents thereof from a specified day.¹

A party contracted to purchase lands of persons not capable of selling, without the authority of this Court, which was subsequently obtained. The purchaser having in the meantime gone into possession of and improved the property, afterwards applied to be relieved from the purchase, and to have the improvements paid for out of the estate, alleging his inability to carry out the bargain. The application was granted in so far as he sought to be relieved from the purchase, and he was declared to be entitled to be treated as the purchaser of the widow's dower, but the Court refused to make him any allowance in consideration of his improvements, or to order the return of the money he had paid.²

The following were cases on bills filed for specific performance: but the principles on which the Court proceeds in compelling a party to accept a title on a bill for the purpose are applicable to cases which arise on a purchase under a decree.

Semble, that from the peculiar mode of dealing with landed estates in this country, the Court will not introduce the strict English rule with regard to waiver of title by acceptance of possession.³

Although at law the right to dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in Equity to compel its removal, or to have specific performance of the contract with an abatement in the amount of the purchase money in respect of such incumbrance.⁴ This case is important, for in many references to the Master as to title the question of dower arises, and as at law, it is not looked upon as more than a nominal incumbrance, an opinion is prevalent that it is so in equity. But this case decides that it is an interest in the property which must be removed before the purchaser can be compelled to complete his purchase; or that if he is willing to accept the

1 Where the possession of the tenant is hostile, it seems that the purchaser may be discharged: *Lachlan v. Reynolds*, Kay, 52, 54.

2 *Re Yaggie*, 1 Cham. Rep. 52.

3 *Morin v. Wilkinson*, 2 Grant, 157.

4 *Van Norman v. Beaupre*, 5 Grant, 599.

property with this incumbrance on it he is at liberty to do so, and in that case he is entitled to a reduction in the purchase money.

In a subsequent case the Court refused to enforce a contract for the sale of land, which was subject to an outstanding claim for dower, until the title to dower was removed.¹

In the case of *Chantler v. Ince*, referred to,² it was held that where property is sold upon credit, and the vendor executes to the purchaser a bond for the due conveyance of the estate, free from encumbrances, on payment of the last instalment of the purchase money, the purchaser cannot, during the currency of the term of credit, call upon the vendor to remove a mortgage created by him upon the property, or to allow the purchaser to apply his purchase money as it becomes payable in discharge of the encumbrance. In a case decided in 1854, several years before the decision in the case of *Gamble v. Gummerson* it was held that where a party agrees to convey property, he is bound to do so free from dower; or, if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money.³ But a sale of land for taxes, under the Wild Land Assessment Act, destroys the right of the widow of the owner to dower.⁴

The principle involved in the case of *Spohn v. Ryckman* is similar. It was there held, an appeal from the Master's report, that a purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate, or that the creditors join in the conveyance to the purchaser, although it appears that the purchase money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the Court will not compel the purchaser specifically to perform the contract.⁵

The purchaser of real estate on which was erected a grist mill, in pursuance of the agreement for purchase took possession, and

¹ *Gamble v. Gummerson*, 9 Grant, 193.

² *Chantler v. Ince*, 7 Grant, 432.

³ *Kendrew v. Shewan*, 4 Grant, 578.

⁴ *Tomlinson v. Hill*, 6 Grant, 231.

⁵ *Spohn v. Ryckman*, 7 Grant, 388.

while in occupation made several alterations in the property, took the mill gearing and machinery from the premises, and removed the partitions in the mill, intending to convert the mill into a planing factory, and the expense of restoring the property to the condition in which it was when he entered into possession was variously estimated at from £100 to £500. *Held*, that by these acts the purchaser had waived his right to call for a good title.¹

Where a contract for the sale of building lots provided for the immediate possession, and for the payment of the purchase money in eight annual instalments. *Held*, that the erection of two workshops on the lots by the vendees was no waiver of their right to examine the title; nor was the division of the property between them when they dissolved their partnership, nor the acceptance of a conveyance at another time of another lot, said to depend on the same title, any waiver. In a suit against purchasers for specific performance, the Court refused, under the circumstances of the case, to order the purchase money into Court, pending a reference as to title, though the defendants were in possession.²

Where a party went into possession under a contract for the purchase of a lot of forest land, in order to clear and cultivate it, and thereby raise the purchase money, which was to be paid by instalments. On a bill filed by the purchaser for a specific performance of the contract. *Held*, that he had not, by going into possession, waived his right to a reference as to title, and that he was bound to pay his purchase money into Court pending the enquiry before the Master.³

Where a purchaser takes possession before conveyance, he is liable to interest from the time of taking possession, and the liability is not limited to a period of six years.⁴ A purchaser, before the time appointed for the completion of a contract for the sale of land, and while the investigation was in progress, went upon and cleared a portion (about two or three acres) of the land sold, and sowed the same with turnip seed, which it was necessary to do, or lose the whole season; he did not, however, harvest the crop, but

1 *Commercial Bank v. McConnell*, 7 Grant, 323; and see *Leslie v. Preston*, 7 Grant, 434.

2 *Darby v. Greenlees*, 11 Grant, 351.

3 *O'Keefe v. Taylor*, 2 Grant, 305; and see *Jackson v. Jessup*, 6 Grant, 156.

4 *Great Western Railway Company v. Jones*, 13 Grant, 355.

abandoned the possession entirely in consequence of objections to the title not being removed. *Held*, no waiver of the purchaser's right to an enquiry as to title.¹

On a purchase of land, the price for which is payable by instalments, the purchaser, although not entitled in the meantime to call for a rescission of the contract, may require his vendor to show a good title before parting with any portion of the purchase money; and in the event of the vendor taking proceedings to enforce payment, the purchaser, upon bringing into Court the amount of principal and interest actually due, will be entitled to an injunction to restrain the action until the title has been investigated; and the fact that prior instalments of the purchase money have been paid, will not disentitle the purchaser to insist upon a good title being shown.²

It may here be mentioned that a purchaser cannot file a bill for a rescission of his contract, but must wait until the vendor attempts to enforce the agreement.³ A clause in the conditions of sale, that the vendors shall only produce certain title deeds and an abstract of the registrar, and that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from showing otherwise a good title.⁴ This case is important as it shows to what length the Court will go in compelling a vendor to give a good title, though he may have attempted to shelter himself from the obligation of showing one by the conditions of sale.

On an enquiry as to title the vendor was unable to produce one of the title deeds, or to show that a receipt was endorsed thereon for the purchase-money: *Held*, no objection to the completion of the contract. So, also, that the non-production of a certificate of no taxes in arrear was no objection to the title.⁵

It may here be remarked that an application by a purchaser in a suit for specific performance for abatement of purchase-money on the ground of outstanding dower should be made in Court, and not in

¹ *Mitchell v. Irwin*, 13 Grant, 537.

² *Thompson v. Brunskill*, 7 Grant, 542.

³ *McDonald v. Garrett*, 7 Grant, 606.

⁴ *Canada Permanent Building Society v. Wallis*, 8 Grant, 368.

⁵ *Thompson v. Millikin*, 9 Grant, 359.

Chambers.¹ Per Spragge, V. C., "What you ask, should, I think, have formed part of the original decree. In the case of a purchase under the decree of the Court an application of this kind would properly be made in Chambers; but not in a suit for specific performance."

When the title has been made satisfactory to the purchaser, or it has been determined to be good, he should pay the balance of the purchase-money into Court. In England this is done by obtaining an order for the purpose; but our order² allows it to be done without resort to the Court; and it then becomes the duty of the vendor to convey the property to him.

Where the party having the conduct of the sale neglects to pay into Court the deposit paid to him by the purchaser at the time of sale, the Court will on the application of the purchaser, order him to do so. *Semble*, that a purchaser at a sale under a decree has a right to take out the report on sale, and get it confirmed so as to obtain a completion of the purchase to himself, at least, where he is the sole purchaser.³ Per Spragge, V.C., "As to the application to give the conduct of the sale to the purchaser, it can be done by the Master, if necessary, but I see nothing to prevent the purchaser taking a report of the sale to himself (here he was the purchaser of the whole property) and proceeding to complete the purchase." Before the Court will compel a purchaser to accept a title it must be shewn that the title is reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th of February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed under which it was found that he was insane, and had been so from the month of February or March previous, the Court refused to enforce the contract.⁴

¹ *Shinnors v. Graham*, 1 Cham. Rep. 212.

² Order 389.

³ *Croote v. Glen*, 1 Cham. Rep. 254.

⁴ *Francis v. St. Germain*, 6 Grant. 636.

SECTION II.—*Proceedings on Obtaining the Conveyance.*

If the parties can agree upon the form of the conveyance they may do so; for a reference to a Master to settle its terms is necessary only when they differ.

The draft conveyance is prepared by the solicitor for the purchaser,¹ and sent by him to the solicitor conducting the sale, in order that he may procure it to be perused and approved on behalf of the necessary parties thereto.²

On a sale under a decree, all persons having a legal interest in the property, whether parties to the suit or not, should concur in the conveyance; but the purchaser is not entitled to the concurrence of any persons being parties to the suit, or otherwise bound by the proceedings therein, whose interests are merely equitable.³

Where in an administration suit, property was sold upon credit, part of the purchase money to be paid down and the balance secured by mortgage, the sale being under the ordinary condition that the purchaser should prepare the conveyance at his own expense. *Held*, that the purchaser must bear the expense of both deed and mortgage.⁴ In ordinary cases, the English rule among conveyancers is, that the vendor is at the expense of the deed, and the vendee of the mortgage, and this is the usual practice in this country. But in our Court, one condition in Schedule P., referred to in Order 379, is that "The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution;" and Spragge, V. C., said, in this case, that it was a general rule that a mortgagor should pay for the preparation of the mortgage deed, and upon that ground, as well as on the authority of *Re Fraser*, decided by V. C. Esten (not reported), he held that the

1 As to the preparation of the conveyance, see *Sug. V. & P.* 567; *Dart*, 325-365; 1 *Davidson* Conv. 499; as to the parties thereto, see *Dart*, 769, 770; and as to covenants for title, see *ib.* 350-364; *Sug. V. & P.* 572, 615, 835; 1 *Davidson*, 100-145, 188-203; 1 *Prideaux* Conv. 138. For precedents of conveyances of estates sold under a decree, see 2 *Davidson*, 244-270; 1 *Prideaux*, 244-247.

2 The solicitor conducting the sale is not entitled to charge for perusing, or for a copy of the draft, unless he is concerned for one of the parties thereto.

3 1 *Prideaux* Conv. 244, n., citing *Dart*, 770; *Keatinge v. Keatinge*, 6 Ir. Eq. 43; *Cole v. Seiwell*, 17 Sim. 40; *Re Williams*, 5 De G. & S. 515; and see *Lewis*, 671, n. (b); 2 *Davidson* Conv. 248, n. (f.).

4 *Fahner v. Ran*, 1 Chanc. Rep. 246.

purchaser should bear the expense of preparing the mortgage. This principle was supported in a subsequent case.¹

It may here be noticed that deeds executed in England, for the purpose of conveying land situate in this Province, do not require to be stamped under the provisions of the English Stamp Acts, but are valid in this Province though unstamped.² The English Stamp Acts do not render an unstamped deed void, but merely inadmissible in evidence in the Courts there; they impose a penalty for not stamping deeds; if this penalty be paid, deeds previously inadmissible would thereupon become valid and admissible. Where, for the purpose of a suit, it is necessary to obtain an order for the execution of a conveyance by infant representatives of a mortgagee not parties to the cause, the proper mode of applying is by petition.³ It not unfrequently happens that, in carrying out a sale, the purchaser is obliged to give a mortgage securing part of the purchase money. The following case was one of specific performance, but the principles involved in it are applicable to the practice now under consideration. In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed, and the vendee to execute a mortgage. *Semble*, that it would be improper to insert a power of sale in such mortgage, and, *quære*, if the deed merely contains qualified covenants, whether the mortgage should contain any others. Where a mortgage has been settled by a Master, and the party ordered to execute it objects to its form, it is not a proper mode of raising such objection to refuse to execute such mortgage and to execute a mortgage differing from the one settled.⁴ A foreclosure suit had been brought and a final order obtained therein; some time afterwards the mortgagor had filed a bill to redeem, and the Court opened the foreclosure and granted redemption, it appearing that no change had taken place in the relative position of the parties. *Held*, on a motion by the mortgagee for payment out of Court of the mortgage money, that it was unnecessary for the wife of the mortgagee to join in the conveyance to the mortgagor to bar dower.⁵ Esten, V. C., said that as a final order for foreclo-

¹ *Watt v. Parker*, 2 Cham. Rep. 33.

² *Murray v. Van Brocklin*, 1 Cham. Rep. 300.

³ *Owen v. Campbell, Re Mills Infants*, 4 Grant. 630.

⁴ *McKay v. Reed*, 1 Cham. Rep. 208.

⁵ *Simpson v. Simpson*, 1 Cham. Rep. 265.

sure was a defeasible instrument, and as there had been no change in the relative position of the parties, it was unnecessary for the mortgagee's wife to be a party to the conveyance in order to release her dower. A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the Court.¹

If the wife of the mortgagor joins in the execution of the incumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the Court made in a cause instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser². Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises; the infant heir is a person seised upon trust within the meaning of the English statute 11 Geo. IV., and 1 Wm. IV., ch. 60, and may be ordered on petition to convey the estate to the executor or to a purchaser for the executor. In such a case, however, the Court will not make the order, unless it appears that the application of the estate in question is necessary for the satisfaction of the debts of the intestate, and a reference as to this will be directed. The petition should be entitled, not in the cause, but in the matter of the infant.³

If the purchaser is guilty of delay in preparing the conveyance, it seems that he may be ordered, on motion, to leave the drafts thereof at the Master's office within a limited time, to be there settled by the Master, and the deed may be then engrossed, executed, and tendered for the purchaser's acceptance.⁴ On the other hand, if there is any improper delay on the part of the vendors in perusing and returning to the purchaser the draft or executed engrossment, he may apply by motion for the return thereof to him.

When a conveyance, or other deed, is ordered to be executed, it usually forms part of the order directing it, that it shall be settled by the Master, in case the parties differ about the same.

¹ *Ross v. Steele*, 1 Cham. Rep. 94.

² *Moore v. Shimmers*, 1 Cham. Rep. 50.

³ *Re Hodges*, 1 Grant, 285.

⁴ *Egan v. Bevan*, 1 C. P. Coop. t. Cott. 381. Probably now, were a purchaser to be guilty of improper delay in preparing and tendering his conveyance, after the limitation of a time for his so doing, the distribution of his purchase money, on notice to him, would not be withheld on the mere ground that he had not got his conveyance.

The course of proceeding under such a direction is pointed out by the 76th of Lord Lyndhurst's Orders,¹ which provides that where a Master is directed to settle a conveyance, in case the parties differ about the same, then the party entitled to prepare the conveyance shall bring the draft of the conveyance into the Master's Office, and give notice of his having so done to the other party. This notice may be given by serving the usual warrant "on leaving"; after which the other party is at liberty, within eight days, to inspect the same without fee, and to take a copy thereof, if he thinks proper.

If the party is not prepared, or likely to be prepared, at the end of the eight days, to adopt the conveyance, or to state his objections to it, he should apply to the Master for further time, which the Master is, by the above order, empowered to grant at his discretion

If he does not obtain an extension of time, he must, at or before the expiration of the eight days, (or having obtained such extension, at or before the expiration of such further time as the Master in his discretion shall allow,) either adopt the conveyance or signify his dissent therefrom, which he must do by delivering a statement, in writing, of the alterations which he proposes to make in the draft of the conveyance, serving, at the same time, a warrant 'on leaving.'

If the party does not signify his dissent, or deliver a statement, in writing, of his proposed alterations, within the eight days, or such further time as the Master may have appointed for that purpose, the Master, at the expiration of the eight days, or the further time which he has appointed, may proceed to settle the conveyance according to the practice of the Court, which he must also do where a statement of proposed alterations has been delivered, and the party bringing in the draft refuses to accede to them.

It is to be observed, that, by the 76th order² it is directed, that in case the Master shall adopt the proposed alterations in the draft of the conveyance, then the costs of the proceeding in respect of the conveyance shall be borne by the other party.

¹ Ord. 1828, as amended 1831. These Orders govern our practice.

² Ord. 1828, as amended 1831.

The rule as to settling conveyances, under the decree of this Court, is thus stated by Lord Hardwicke—"Where conveyances are to be made by a decree of this Court, the settling them to be sure is to be by the like kind of rule, as men of judgment among the conveyancers would direct."¹ This being the rule, the Court sanctions the practice, generally resorted to by the Masters, before selling a conveyance, or directing the draft to be laid before a conveyancer to advise upon it,² in which case the same course of proceeding must be adopted as when he directs an abstract to be laid before a conveyancer.

When the Master has settled the draft of the conveyance, an engrossment of it will be made, and the Master will signify his allowance of it by signing his name in the first and last sheets, and also his allocation in the last sheet, in the following form, in the margin of the engrossment.—"*A. v. B. I approve of and allow this indenture, being the same mentioned in the decree within referred to, dated.....*"

The conveyance, having been approved of by the Master, must be executed by the parties, and, if anything is required to be done by the Court on the execution of the conveyance, an affidavit of such execution must be made, and on such affidavit the Master will issue his certificate, which is filed in the usual manner.³

Exceptions lie to the Master's certificate of having settled a conveyance,⁴ and in *Lloyd v. Griffith*,⁵ the Court directed the Master forthwith to make his certificate or report of his approbation of the draft of a conveyance, which he was to settle in order that the party might except thereto.

Where any of the parties to the suit refuse to execute a conveyance to which they have been properly made parties, the purchaser may apply, by motion, that they may be ordered to execute the same within a limited time. The notice of motion must be served on the solicitor of the party, or on the party himself where he acts in person; and must be supported by an affidavit of the facts; and

¹ *Lloyd v. Griffith*, 3 Atk. 264.

² *Turner v. V.* 421; *vide* 3 Atk. 266.

³ 2 Smith, 196.

⁴ *Wakenan v. Duchess of Rutland*, 3 Ves. 504; *Lloyd v. Griffith*, 3 Atk. 264.

⁵ *Dick*, 103; and *Huggins v. York Buildings Company* cited *ibid*.

of due service of the notice, in case he or his solicitor does not attend. * The order on the motion should then be served on the party personally, in the usual way; and if he refuses to obey it, an attachment or other process of contempt may be issued against him.

The process of contempt, however, is not well adapted to enforce obedience to an order by which a person is directed to execute a deed; and therefore the usual course is for the purchaser to apply under the provisions of the Chancery Act, ch. 12, of Con. Stat. U. C. Section 63 of that Act provides that, "In every case in which the Court has authority to order the execution of a deed, conveyance, transfer, or assignment of any property, real or personal, the Court may make an order or a decree, vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment, or transfer if executed; and thereupon the order or decree shall have the same effect, both at law and in equity, as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person."

This section is taken from the Imp. Stat. 13 & 14 Vic., ch. 55, and the English decisions are applicable.

It seems that an order may be made under the above provisions, although the person whose estate is sought so to be divested or conveyed is able and willing to convey it to the purchaser;¹ but recourse is usually had to the Act where any person whose concurrence is required in the conveyance is not in *esse*, is out of the jurisdiction, cannot be found, or is under any disability.

An application under these provisions, is, in the case of a sale, made by motion. The purchaser is, it seems, the proper person to make the application, if his purchase money has been paid into Court;² but the plaintiff may be a co-applicant;³ and the purchasers of several lots may unite in one application.⁴ A vesting order will

¹ See *Hancox v. Spittle*, 3 Sm. & G. 478.

³ *Rowley v. Adams*, 14 Beav. 180.

² *Ayles v. Cox*, 17 Beav. 584.

⁴ *Ibid.*

not, of course, be made till the purchase money has been paid ; nor, in general, will an order appointing a person to convey. The notice of motion should be served on the solicitor of the party having the conduct of the sale, where he is not an applicant ; and on the solicitors of the parties whose estates are sought to be divested or conveyed. The application must be supported by the production of the decree or order for sale, the Master's report on the sale, or the order confirming the sale by private contract, the order, if any, for the payment of the purchase money into Court, and an office copy of the Registrar's certificate of the payment thereof ; and by evidence showing that the estate is vested as alleged, and the grounds on which the order is sought.

Where the order is necessary in consequence of the disability of any person, the costs should, it seems (in the absence of condition to the contrary), be paid out of the purchase money.¹

A party purchasing under a decree of the Court, has a right to call for evidence shewing that persons whose interests were intended to be disposed of were alive at the time of such sale, before accepting title by means of a vesting order. And *quære*, whether under any circumstances, the Court would compel a purchaser to accept title by vesting order, instead of a conveyance.² Where the property of infants has been sold under order of Court, and the purchaser applies for a vesting order, notice need not be given to the infants.³ Where a party to a suit is directed by decree or order to execute a conveyance to another party, but cannot be found after due diligence, and the deed therefore cannot be tendered for execution, a vesting order will be granted *ex parte*.⁴ An application, exactly similar, was granted *ex parte*, on 12th April, 1864, by V. C. Spragge, in *Henry v. Graham*. In *Bowen v. Fox*,⁵ an application was made on behalf of the plaintiff, who was mortgagee in fee of the premises, for an order vesting in him certain lands purchased by him at a sale thereof under the decree in the cause. The defendant did not object to the motion being granted, but V. C. Mowat, following the ruling in *Ross v. Steele*,⁶ refused the appli-

1 *Ayles v. Cox*, 17 Beav. 584; and see *Bradley v. Munton*, 16 Beav. 294.

2 *Slater v. Fiske*, 1 Cham. Rep. 1.

3 *Boulton v. Stegman*, 1 Cham. Rep. 199.

4 *McNair v. Simpson*, 1 Cham. Rep. 299.

5 *Bowen v. Fox*, 1 Cham. Rep. 387.

6 *Ross v. Steele*, 1 Cham. Rep. 94.

cation, considering that the same reasons which weighed against ordering the mortgagor in such a case to join in a conveyance to the purchaser, would operate against making the order asked for ; the legal estate being already vested in the purchaser, the plaintiff in the cause. In *Ross v. Steele*, it was held that a mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the Court. In this case the heirs were infants, but V. C. Spragge said he had before decided that the infants in such a case were not necessary parties, and referred to *Re Williams*,¹ where the same had been held in England. A motion to dispense with payment of purchase money (and for a vesting order) in favor of a purchaser under a decree, who is also one of the plaintiffs, requires notice to be served on the mortgagor where he has appeared by solicitor.² A mortgagor who has, in the course of a foreclosure suit, duly redeemed the property, is not obliged to accept a simple discharge of the mortgage, but may at his option have a vesting order of the property.³ An application for a vesting order was made on behalf of the plaintiff, who was also the purchaser of the land sold in the cause. No objection was made to the action by any of the defendants, but it was thought that in such a case a vesting order could not be granted, inasmuch as the Court could not compel the defendant to execute a conveyance to the plaintiff. Several cases were cited, in which a vesting order had been made in favor of the plaintiff, who was also the purchaser of lands sold in such suits ; but it was considered that such orders were improperly granted, because the facts had not been fully set before the judges before whom the applications were made.⁴

It may here be noticed that the Court will direct the costs of a guardian to be paid before granting a vesting order to the purchaser.⁵ Where the plaintiff, who was the mortgagee in fee of lands sold under the decree, had become the purchaser thereof ; an order vesting the lands in the plaintiff as such purchaser, although acquiesced in by the defendant, was refused.⁶ Where in a suit by credi-

1 21 L. J. N. S. Cy. 437.

2 *McMaster v. Kempshall*, 1 Cham. Rep. 329.

3 *Ellis v. Ellis*, 1 Cham. Rep. 257.

4 *Bowman v. Fox*, 1 Cooper's C. & P. R. 53 ; 2 U. C. L. J. N. S. 302.

5 *Thorne v. Chute*, 2 Cham. Rep. 221.

6 *Bowen v. Fox*, 1 Cham. Rep. 387.

tors to set aside a settlement, lands were ordered to be sold, and the proceeds paid into Court; a purchaser after confirmation of sale paid his money into Court, and had his conveyance prepared and tendered for execution to the trustees who were absent from the jurisdiction, and who refused to execute it; a vesting order was granted, and the costs of the motion were ordered to be paid out of the fund in Court.¹ In a case where infants were interested, and it was necessary to have the conveyance settled by the Master, and one of the parties to the conveyance being out of the jurisdiction, it also became necessary to obtain a vesting order, the Referee allowed the purchaser the extra costs so incurred. But a question being raised as to the executors, and it being shewn that they disclaimed all interest when applied to, no costs occasioned by such question were allowed.²

The purchaser is entitled, on the completion of his purchase, to have delivered up to him the title deeds relating to the estate he has purchased, or such of them as he is not, by condition or contract, precluded from claiming.³ If the deeds have been deposited in Court, the solicitor conducting the sale should obtain an order that they may be delivered out to the purchaser. This order is obtained on motion, or, by consent.

Where the property is sold in lots, the conditions of sale should provide that the purchaser of the largest part in value of the property held by the same title shall be entitled to the custody of the title deeds.⁴

We have seen that by Order 388 the purchaser may at any time after the confirmation of the sale, pay his purchase-money into Court without further order, upon notice to the party having the conduct of the sale; and until he has got his conveyance, the Court will not, without his consent, pay off any incumbrances out of his purchase-money; although he has been guilty of delay.⁵ After the execution of the conveyance, the Court will not impound the money,

¹ *Lawson v. Buckley*, 3 Cham. Rep. 270.

² *Re McMorris*, 3 Cham. Rep. 430.

³ As to title deeds and attested copies, see *Sug. V. & P.* 97, 433-453, 837; 1 *Prideaux*, Conv. 143, 144; *Dart*, 439, 442, 772; 1 *Davidson* Conv. 514, 515; and see *Peterson v. Elwes*, 6 W. R. 611, V. C. W.; *Strong v. Strong*, 4 Jur. N. S. 943, V. C. E.

⁴ 1 *Davidson* Conv. 539, 560; and see *Griffiths v. Hatchard*, 1 K. & J. 17; 18 Jur. 649; *Lord Kinaird v. Christie*, 1200; followed in *Scott v. Jackman*, 21 Beav. 110.

⁵ *Bevan v. Bevan*, 1 C. P. Coop. t. Cott. 381; *Sug. V. & P.* 108.

upon an objection from the purchaser, grounded on notice of an adverse claim: if evicted, he must resort to the covenants in his conveyance;¹ and where, on the sale of a copyhold estate devised by will, a day to show cause was given to the infant heir, the Court, during his minority, ordered a distribution of the purchase-money among the parties entitled under the will, and refused to impound any part of it to indemnify the purchaser from the payment of any additional fine which might become due.² Where, however, an immediate conveyance cannot be obtained, the distribution of the purchase-money will be suspended.³

Though the purchaser, after getting his conveyance, cannot be heard to object to the fund being dealt with, yet, while the order entitling him to notice remains undischarged, the Court will not deal with it, without proof by affidavit of notice to him of the application, whether the order be entered with the Registrar or not, nor without proof that he has had his conveyance: unless he appears and admits these facts.⁴ It is usual for the solicitor conducting the sale to obtain from the purchaser, on delivering to him his conveyance, an acknowledgment of such delivery, and an authority to appear and consent in his name, but free of expense to him, to any distribution of his purchase-money which the Court may direct; and where the purchaser has obtained his conveyance, he will not be allowed his costs of appearing, on an application to deal with his purchase-money,⁵ except under special circumstances.⁶ But if he has not obtained his conveyance, he will be allowed his costs of appearing: although he only appears for the purpose of consenting to the order.

Where an estate is agreed to be sold free from incumbrances, and the amounts due can be clearly ascertained, and the priorities are undisputed, the purchaser may apply for leave to pay off the incumbrances out of his purchase-money, on the incumbrancers executing the conveyance to him,⁷ and to pay the residue into Court;⁸ or he

1 *Thomas v. Powell*, 2 Cox, 394.

2 *Morris v. Clarkson*, 3 Swanst. 558, 567.

3 *Henning v. Archer*, 9 Beav. 366.

4 See *Seton*, 1197.

5 *Barton v. Latour*, 18 Beav. 526.

6 *Rowley v. Adams*, 16 Beav. 312; *Strong v. Strong*, 4 Jur. N. S. 948, V. C. S.; *Noble v. Stow*, (No. 2), 30 Beav. 272.

7 Where the security is merely equitable, a conveyance is not in general necessary.

8 *Seton*, 287.

may arrange with the incumbrancers that their charges shall be kept on foot as against the estate and the purchaser only, and apply for the sanction of the Court to the arrangement.¹ Where the purchase money has been paid into Court, the party conducting the sale may apply, that, upon the execution by the incumbrancers (if proper parties) of the conveyance to the purchaser, the amounts due to them may be paid out of the purchase-money.²

We have hitherto discussed the course of proceeding to complete a sale, as applicable to those cases only in which the purchaser is desirous and willing to complete it himself. It may, however, happen, that, after he has been allowed as the purchaser of a lot, he becomes unwilling to complete his purchase: in that case, it is the duty of the solicitor conducting the sale, who acts on behalf of all parties, to take the necessary steps to compel him. The rule, that the report on the sale must have become binding by being confirmed before the contract can be considered as complete, applies equally to the cases in which it is sought to compel a purchaser to complete his purchase, as to those in which he himself seeks to enforce the contract.³ As a preliminary step, therefore, it is necessary that such certificate should have been filed in the usual manner, and the time have expired for appealing against it.

If the purchaser neglects to pay in his purchase-money in due time, the Court, on being satisfied that he has accepted the title, or is precluded from objecting to it,⁴ and that the time for payment has expired, may order him to pay his purchase-money into Court by a limited time; and in default may direct a resale. The application for the order is made on motion, by the solicitor conducting the sale. The notice of motion must be served on the purchaser, and be supported by evidence of his default.⁵ The motion may either be confined to the object of obtaining a compulsory order for payment of the purchase-money: in which case, if default is made in payment, an order for a resale may be obtained on a subsequent application; or it may also ask that, in default of payment, a resale may be directed, and the purchaser ordered to make good any deficiency in

¹ For form of order, see *Seton*, 1202.

² *Seton*, 237.

³ *Anon.*, 2 Ves. J. 335; *Vincent v. Going*, 3 Dr. & War. 76, n. (a.).

⁴ *Rutter v. Marriott*, 10 Beav. 33; *Bulmer v. Alison*, 8 Jur. 440, V. C. W.; *Seton*, 1194.

⁵ For form of order, see *Seton*, 1194.

in price thereat, and the costs occasioned by his default;¹ but the purchaser should not be discharged from his purchase.² If, on the hearing of the motion, it appears that the purchaser ought not to be considered as having accepted the title within the meaning of the conditions of sale, he may ask for an inquiry whether a good title can be made: in which case he should, on a separate motion, obtain an order for an inquiry into the title, and prosecute such order in the usual way.

If an order to compel the purchaser to pay in his purchase money is made, it must be served personally upon him; and, if not complied with, it may be enforced by attachment and other process.

A sale before the Master was not within the Statute of Frauds; and after confirmation of his report, the sale might be enforced against the representatives of the purchaser, although he had not signed the contract: the judgment of the Court taking it out of the Statute; and this rule no doubt still prevails.³ The Court, however, cannot enforce the contract against them without a suit, but it will allow the heir to have the benefit of the contract, upon payment of the purchase money, leaving it to him to compel the executors to reimburse him, if they have assets; and, where the heir refused to accede to this arrangement, the Court directed a resale: reserving the consideration as to any deficiency that might arise on the resale, and by whom the costs of it were to be repaid.⁴

If at the hearing of the application to compel the payment of the purchase money, the purchaser can show any sufficient cause why the contract should not be enforced, it will be rescinded; but as a general rule, where a sale has been fairly and properly conducted, and the party is able to complete his contract, he will be held strictly to his bargain. Where, however, the contract is inequitable,

¹ *Gray v. Gray*, 1 Beav. 199; *S. C. nom. Saunders v. Gray*, 4 M. & C. 515, n. (a.); *Harding v. Harding*, 4 M. & C. 514; 3 Jur. 1164. It is presumed that a resale may be directed, without giving the purchaser the option of paying in his purchase money; see *Foligno v. Martin*, 16 Beav. 586; *Sweet v. Meredith*, 4 Giff. 207; 9 Jur. N. S. 569; but see *Robertson v. Skelton*, 13 Beav. 91, where a purchaser was allowed to complete after an order for a resale.

² *Gray v. Gray*, and *Harding v. Harding*, *ubi sup.*; but see *Holder v. Ruffin*, 1 V. & B. 544; *Cunningham v. Williams*, 2 Aust. 344. Where the purchaser became bankrupt before completion, and the assignees declined to complete, the Court held that the deposit paid by him was forfeited, and ordered a resale; *Depree v. Bedfordrough*, 4 Giff. 479; 9 Jur. N. S. 1317.

³ *Sug. V. & P.* 109, citing *Attorney-General v. Day*, 1 Ves. S. 218.

⁴ *Lord v. Lord*, 1 Sim. 503-505.

the Court will relieve the purchaser as well as the seller.¹ Where, also, it is clear that the purchaser is not a responsible person, it is sometimes found to be more beneficial to the parties that he should be discharged at once from his contract, on his submitting to forfeit his deposit, if any, and paying the costs, than to incur the expense and loss of time attendant on keeping him before the Court till after a resale. In such a case, an application for the sanction of the Court to the arrangement should be made, supported by an affidavit of the facts; and the purchaser must be served, and appear and consent.

Where it was discovered that the purchaser was insane at the time of the bidding, he was discharged from his purchase; but the Court would not direct the next best bidder to be declared purchaser, although asked to do so on behalf of all the parties in the cause, and the bidder consented; but directed a resale.²

If an order is made for a resale, it is to be proceeded with in the Master's office in the usual way. Should there be no bidding at the resale, or if the highest bidding is less than the purchase money of the defaulting purchaser, the Master will certify the fact in his certificate of the result of the sale; and as the order for the resale usually directs that the former purchaser shall, within eight days after the certificate, pay into Court either the whole amount or the amount of the deficiency, as the case may be, as certified by the Master together with the costs occasioned by his default,³ a copy of the Master's certificate should be served on the former purchaser, and if default is made in payment, an attachment or other process of contempt may be issued and enforced against him. The costs may be taxed and recovered in the usual way.

If, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the Court will make an order to that effect, on the application of the original and sub-purchasers, or of either of them with the consent of the other.⁴ The summons must

¹ *Sug. V. & P.* 119.

² *Blackbeard v. Lindigren*, 1 Cox, 205; see, however, *Dart*, 752, n. (y); and *Hughes v. Lipscombe*, 6 Hare, 142.

³ See *Seton*, 1210.

⁴ Where neither the original purchaser nor the vendor consented, the application was refused: *Re Settled Estates Act*, 4 Giff. 90; S. C. nom. *Re Goodwin*, 8 Jur. N. S. 1178.

be served on the solicitor conducting the sale, whose costs will be costs in the cause.¹ The substitution will be conditional on the purchase money being first paid.²

The application must be supported by an affidavit of the original and sub-purchasers, or one of them, showing there was no collusion or under-bargain between them before the report on sale was binding, or disclosing the terms of the under-bargain, if any,³ as it appears, that if a purchaser re-sell behind the back of the Court before the report of his being a purchaser has become binding, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the parties to the suit.⁴ Where the highest bidder at an auction induced the auctioneer to accept another person in his place, concealing the fact that he had sold his bargain at an advance, which he received and then absconded, the property was ordered to be resold, reserving all questions of liability of the original or sub-purchaser.⁵

After the report has become binding, the purchaser may resell at a profit for his own benefit;⁶ and if the purchase money has been paid into Court, an order to substitute the sub-purchaser will not be essential to entitle him to call for a conveyance, with the assent of the original purchaser, for the ordinary form of order under which purchase money is paid into Court directs the conveyance to be made to the purchaser, or as he shall direct.⁷

Where the purchaser entered into a sub-contract, but died before its completion, and his heir was abroad, the sub-purchaser was substituted, on paying the original purchase money into Court.⁸

The practitioner has now conducted his case nearly to an end. In the case of foreclosure he has registered the final order of foreclosure; in the case of a sale he has seen that the title is good

1 *Christian v. Chambers*, 4 Hare, 307. For form of order, see *Seton*, 1207.

2 *Rigby v. Maenamara*, 6 Ves. 515; and see form of order in *Seton*, 1207.

3 *Rigby v. McNamara*, *ubi sup.*; *Vale v. Davenport*, 9 Ves. 615; *Holroyd v. Wyatt*, 2 Coll. 327; 9 Jur. 1072; *Seton*, 1203; and see *Dewell v. Tuffnell*, 1 K. & J. 324.

4 *Hodder v. Ruffin*, Tamil. 341; *Sug. V. & P.* 100.

5 *Holroyd v. Wyatt*, 2 Coll. 327; 9 Jur. 1072; In *Re Settled Estates Act*, 4 Giff. 90; S. C. *nom. Re Goodwin*, 8 Jur. 1173, a re-sale was ordered on the terms of the original purchaser paying the advance into Court.

6 *Dewell v. Tuffnell*, 1 K. & J. 324; *Sug. V. & P.* 100.

7 See form of order, *Seton*, 1193; and see *Matchett v. Palmer*, and *Haire v. Lovitt*, cited *ib.* 1208, where the original purchaser had died after payment, but before conveyance. For form of conveyance to a sub-purchaser, the original purchaser joining, see 1 *Prideaux Conv.* 243.

8 *Pearce v. Pearce*, 7 Sim. 138.

that the conveyances are executed, and that the proceeds of the sale are in Court for distribution among the parties entitled. The practice in paying money out of Court will be considered in another place. But another point is to be considered. In the case of a sale, it often happens that the proceeds are insufficient to pay the plaintiff. It will be remembered, that by Order 454, the purchase money is to be applied in payment of the amounts found due to the plaintiff, and to the other incumbrancers according to their priority; and Order 455 provides that, "In the event of the purchase money being insufficient to pay what has been found due to the plaintiff for principal, interest and costs, subsequent interest, and subsequent costs, the plaintiff is to be entitled (where the mortgagor is a defendant, and such relief is prayed by the bill) to an order *ex parte* for payment of the deficiency."

In such a case the plaintiff must proceed in the Master's office in the usual way: take out and serve a warrant, underwritten, "*To take subsequent account; tax subsequent costs; ascertain the deficiency now due to the plaintiff; and settle and sign report as to deficiency.*" On the costs being revised, the Master settles and signs his report in the usual way; but this report does not require confirmation, and the plaintiff may obtain his order for payment of the deficiency *ex parte* from the Registrar, on which he proceeds to obtain a *fi. fa.* or other process, as described in another place.

If the bill were taken or noted *pro confesso* against the defendant, and if he filed no traversing note, this account may be taken *ex parte*; but otherwise a warrant must be served, underwritten as already described.

Proceedings in case of Redemption.

A decree for redemption directs the plaintiff to pay the balance reported by the Master to be due by him to the mortgagee, within six months after the making of the Master's report; and in default, that his bill is to be dismissed with costs.

Order 466 provides that, "In a redemption suit, if the plaintiff does not redeem the defendants or such of them as he is ordered to redeem, the bill need not be dismissed; but where there are other

defendants, in lieu of the bill being dismissed the plaintiff may be declared foreclosed, and directions may be given, either by the decree, or by subsequent orders, as to the relative rights and liabilities of the defendants as amongst themselves; and such proceedings are in such case to be, therefore had, and with the same effect, as in a foreclosure suit." This order simplifies the proceedings in redemption suits; if the plaintiff redeems by paying the amount found due by the Master's report, the mortgagee is bound to re-convey the premises, and this terminates the suit; if he makes default in paying at the time appointed by the report, the defendant applies to the Court, in the ordinary way, for an order dismissing the bill; and on this application the Court may, if a proper case be shewn and other parties are interested, convert the case into one of foreclosure. In such an event, the decree would be worked as an ordinary one of foreclosure, the proceedings in which have already been stated.

In proceeding upon a decree for redemption, the Master will direct the mortgagee to bring in his account of the amount claimed, and this will be framed and verified by his affidavit, precisely as if he were proceeding to foreclose. The Master will take the account as he would under a foreclosure decree, and the plaintiff will be at liberty to surcharge as in other cases. Where the account is taken the costs will be taxed and revised, and the report prepared and issued as in other cases. The practice as to attending to receive the redemption money, and the course to be pursued where the state of the account has been altered by receipt of rent or by occupation, will be similar to that already pointed out in foreclosure cases.

Investments in the Purchase, or on Mortgage, of an Estate.—Before a fund under the control of the Court will be ordered to be laid out in the purchase, or advanced upon the security, of an estate, the Court must be satisfied that the estate is a fit and proper purchase or security, and that a good title can be made to it.¹ Under the present practice, a conditional contract for the purchase or

¹ As to investments by the Court, and by trustees under or without its sanction, see 2 L. C. Eq. 743-750, 972-3; *Levin*, 232-251, 689, 700, 743-750; *Seton*, 64, 65, 490-492, 527, 775-778; 2 *Spranger*, Eq. Jur. 925-927; and for forms of orders in such cases, see *Seton*, 490, 491, 525, 776.

advance is usually entered into;¹ and the contract, and evidence of the fitness of the purchase or security, are produced at the time of making the application. If the Court or judge is satisfied therewith, the investment is approved at once,² and an order made for an inquiry whether a good title can be made to the estate;³ and directing that, in case a good title can be made, a proper conveyance be settled by the judge; and that upon the due examination thereof being certified,⁴ the purchase or mortgage money be paid over to the persons entitled thereto. If the Court or judge is not satisfied with the evidence in support of the application, an inquiry as to the propriety of the proposed investment will be directed; in which case, consequential directions, in the event of such investment being approved, will be given by the order.⁵

The order is usually made upon a petition, stating the particulars of the proposed purchase or security; it has, however, been sometimes made on motion at Chambers.⁶ The petition or motion must be supported by the affidavits of surveyors or other qualified persons, stating the size, value, rental, and outgoings of the estate and any circumstances rendering the proposed purchase or security desirable.⁷

The investment having been approved, the abstract of title is examined with the title-deeds, by the solicitor having the carriage of the proceeding, or by some other qualified person employed by him,⁸ and an affidavit of such examination, and that the abstract is true and correct, is carried, with the abstract, into the Judge's Chambers. Where it is not made to appear by the affidavit that the examination is made by a solicitor, the solicitor concerned should join in the affidavit, and state that it was made by a person competent so to do. If conveyancing counsel make any requisitions on the title, they are dealt with in like manner as on a purchase

1 As to agreements relating to land, see *Sug. V. & P.* xii.—xix., 820; *Add. Cont.* 65-117; 1 *Prideaux* Conv. 43-52. As to contracts by agents, see *Add. Cont.* 588-634; *Sug. V. & P.* 820; and for form of agreements for the sale and purchase of land, see 2 *Davidson*, Conv. 3-14, 29, 63; 1 *Prideaux*, Conv. xv.-xvi., 53-74; and for a loan of money on mortgage, *ib.* 74.

2 *Seton*, 492.

3 The title is sometimes approved by the order sanctioning the investment: see *Seton*, 491, No. 2.

4 Where the fund is not in Court, a certificate of execution is not required: see *Seton* 492.

5 See *ibid.* For form of order, see *ib.* 490.

6 *Seton*, 492.

7 *Seton*, 492; *Re Kinsey*, 1 N. R. 303, M. R.

8 As to the verification of the abstract, examination of the deeds, and investigation of the title, see *Dart*. 204-274, 275-297, 761; 1 *Davidson*, Conv. 485-493, 507; 1 *Prideaux*, Conv. 92-103; *Sug. V. & P.* 405-432.

out of Court; and if any difficulty arises on the title, the matter may be brought under the notice of the Judge in Chambers, at an appointment obtained for that purpose.¹

It may be mentioned here that, where the conveyancing counsel certified that, though a good title of sixty years was not shown, yet the title was a safe holding one, the proposed purchase was sanctioned by the Court; it appearing, in other respects, to be desirable, and for the benefit of the person entitled, who was an infant.²

When the title is approved by the conveyancing counsel, and the draft conveyance or mortgage settled by him, such draft, or a fair copy thereof, is left at Chambers,³ and an appointment obtained and served to proceed thereon. At this appointment, the final opinion of counsel on the title should be produced; and if the opinion is satisfactory, the draft conveyance or mortgage will be settled and marked for engrossment.⁴ An affidavit must be made that the engrossment is a correct transcript of the draft settled at Chambers; and on production of an office copy of the affidavit, with the engrossment and draft, the Referee or Judge will sign a memorandum of allowance in the margin of the first skin of the engrossment, and will write his initials on each of the other skins. The draft of his certificate that a good title has been made, and that the conveyance has been settled, will then be issued, and an appointment given to settle the draft. On attending such appointment, the solicitor having the conduct of the proceeding should produce an affidavit showing that the searches directed to be made by the conveyancing counsel for judgments, *lites pendentes*, crown debts, or other incumbrances, have been made accordingly, and that none have been found, or as the case may be.⁵ This affidavit should, in

¹ *Ex parte Christ's Hospital*, 2 H. & M. 166-168.

² *Re Sheffield and Rotherham Railway Company*, 1 Sm. & G. App. 4; but see *Ex parte Christ's Hospital*, 2 H. & M. 166-168.

³ If a copy is left, a certificate, signed by the solicitor, that it is a true copy, is usually required.

⁴ As to conveyances, see *Sug. V. & P.* 567-568; 2 *Davidson*, Conv. 169-205; 1 *Prideaux*, Conv. 122-145; as to covenant for title, *Sug. V. & P.* 572-615; *Dart*, 350-364; 1 *Davidson*, 100-145, 188-203; 1 *Prideaux*, 138-140; and for forms of conveyances, 2 *Davidson*, 465; 1 *Prideaux*, xvi.-xxi., 152-296, as to mortgage deeds, see 2 *Davidson*, 497-728; 1 *Prideaux*, 309-354; and for forms, *ib.* xxii.-xxvi., 359-514; 2 *Davidson*, 998. For the ordinary conveyancing charges in common cases, see *Morgan & Davey*, 500, *et seq.*

⁵ As to searches for incumbrances, see *Dart*, 302-324, 768; 1 *Prideaux*, Conv. 108-121; *Sug. V. & P.* 516-548, 847; and as to relief from incumbrances, *Sug. V. & P.* 45-658. The conveyancing counsel should always specify, in his opinion on the title, what searches are to be made, and against whom.

strictness, bring down the searches to the date of the Referee's certificate approving the title, and should be sworn on that day. The certificate, when settled, is completed in the usual way.

The engrossment of the conveyance or mortgage having been allowed as above explained, is then executed by the necessary parties; and if the order directs the Referee to certify such execution, an affidavit of the execution is thereupon filed, and an office copy procured and left at Chambers with the deed, and with an office copy of the certificate approving the title. From these documents, the Referee will prepare and issue his certificate of execution, and certify to whom the purchase or mortgage money is to be paid¹ On production of a copy of the certificate of execution and of the order directing the payment to be made, the accountant will issue a cheque for the money to the person named in the certificate. It is to be observed that these proceedings are, in this country, usually taken in the Master's office.²

Partnership Suits.—A decree for the dissolution of a partnership ordinarily directs an account to be taken of all dealings and transactions between the partners: either generally, or from the foot of the last stated account, or other specified time; and also an account of the credits, property, and effects due and belonging to the partnership; and directs a receiver to be appointed of the outstanding debts and effects, or provides some other means of realisation.³ Upon the return of the warrant to proceed on the decree, directions will be given as to the person by whom, and the mode in which, the account is to be prepared and brought in; and where deemed expedient, the employment of an accountant will be sanctioned. This is the English practice before a Judge in Chambers, and our order 541 provides that the Court may call in the assistance of accountants; but the Master has no such power. Where it becomes necessary for parties to employ an accountant in order to prepare proper accounts

1 In some of the Chambers, it is the practice not to issue any certificate till the deed has been executed. In such case, one certificate is made to embrace all the objects of the two certificates mentioned in the text.

2 As to the enrolment of the conveyance, under the Mortmain Act, see *Ex parte Christ's Hospital*, 12 W. R. 609: V. C. W. Where enrolment is required, the certificate of execution should not be issued till the conveyance has been left at the Enrolment Office, and the receipt of the Clerk of Enrolment is produced.

3 For the law respecting private partnership, and the practice in suits relating thereto, see *Add. Cont.* 635-668; L. C. Merc. 279-361; *Lindley* on Part. vii. xxi.; *ib.* Sup. 1-180; *Seton*, 542-561; and for various forms of decrees and orders in such suits, see *Seton*, 540-561.

for the Master's office, they must do it at their own expense; though in a proper case, the party going to this necessary expense, will, if successful in the suit, probably be allowed the outlay on the taxation of costs. It is usual, however, for the parties to consent to the employment of an accountant, and that his charges should be paid out of the estate; but without this consent he cannot be employed without an order of Court.

Where a sale is directed, with the approbation of the Master, or a receiver has to be appointed, the practice is the same as in other cases. On the proceedings before the Master being brought to a conclusion, the result is reported by him in the usual way.

Management of Property.—The institution of a suit against trustees, for the administration of the trust estate under the direction of the Court, does not preclude the exercise of the discretion given to the trustees, by the instrument creating the trust, as to the appointment of new trustees, or the management of the trust estate; but the trustees are required, after the institution of the suit, to act under the control of the Court.¹ After a decree has been made, the powers of the trustees are thenceforth so far paralysed, that the authority of the Court must sanction every subsequent proceeding: thus, the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing; a trustee for sale cannot sell; and an executor cannot pay debts, or deal with assets for the purpose of investment.² Applications for the sanction of the Court, in such cases, are usually made by motion, supported by affidavit or other evidence of the facts.

Where the object is to commence or defend any action, suit, or other legal proceeding, the opinion of counsel, in actual practice, is usually required that there is a good ground of suit or defence.

Where the outstanding estate of a testator or intestate is directed to be got in with the approbation of the Master,³ applications may

1 *Cafe v. Bent*, 3 Hare, 245; *Costabadie v. Costabadie*, 6 Hare, 410; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Attorney-General v. Clack*, 1 Beav. 467; *Graham v. Graham*, 16 Beav. 560; *Peetfield v. Benn*, 17 Beav. 522; *Lewin*, 389; *Hill on Trustees*, 567; *Haddan*, 32.

2 *Lewin*, 389, and cases there cited; *Hill*, 557. That a trustee or executor is not, after decree, absolved from the duties imposed by his office, see *Lewin*, 389; *Garner v. Moore*, 3 Drew. 277. As to the duties of trustees and executors, in respect of outstanding property, see 2 L. G. Eq. 733-9, 2 *Spence Eq. Jur.* 923-4.

be made by motion for leave to sell or convert the same, or to take proceedings or accept a composition in respect thereof.¹

Among other subjects of application at Chambers, relating to the management of property under the direction or control of the Court, may be mentioned: investments in the purchase, or on mortgage, of land; repairs;² renewing leases;³ and cutting and selling timber.⁴

Where the sanction of the Court or Master is necessary to the letting of property on lease,⁵ the terms thereof are reduced into writing, in the form of an agreement conditional on the approval thereof by the Court.⁶ A notice of motion, or a warrant for an order to carry such agreement into effect is thereupon served; and the application is supported by the production of the agreement, and by the affidavit of a land agent, or other competent person, stating the grounds on which, in his judgment, the agreement should be adopted. The power to demise on the terms of the agreement must also be shown, by the production of the probate of the testator's will, the settlement, or other evidence thereof. If the agreement is approved, an order is made, directing it to be carried into effect, and that the lease to be granted pursuant thereto be settled by a Judge or Master either absolutely or in case the parties differ. Where it is necessary for the Master to settle the lease, a copy of the order, if drawn up, is left at his Chambers, and a warrant to settle the lease is taken out and served; the draft is brought in and settled, by him, with the assistance, if necessary, of conveyancing counsel; the draft is then engrossed, and the same steps are taken as in settling a deed; and thereupon, if desired, the Master issues his certificate of the result of the proceeding: which is completed in the usual manner.⁷

Raising Money by Sale or Mortgage.—Where an order directs money to be raised by a sale or mortgage of an estate,⁸ upon the

1 For various forms of orders relating to outstanding estate or securities, see *Seton*, 189 191.

2 *Seton*, 508-510-513.

3 *Seton*, 513-521.

4 *Seton*, 505-513.

5 As to powers of leasing, see *Sug. Pow.* 711-835; *Sug. Stat.* 310-313; *Shelford R. P. Acts*, 683-6, 685. As to contracts between landlord and tenant; the rights and liabilities of the parties; and judicial procedure, see *Woodfall*, ix-xii, 1-320-632-696; see also *Add. Cont.* 314-375; *Dixon*, xiii-xv; *L. C. Conv.* 240-273; 1 *Platt*, xl-xxvii; 2 *Platt*, 82-154; *Smith's Comp.* 660-676; *Williams' R. P.* 352-381.

6 As to agreements for leases, see 5 *Davidson*, *Conv.* 1-18; and for forms of agreements for leases, and of leases, see 5 *Davidson*, 19-82, and 96-472; *Woodfall*, 966-907. As to agricultural customs, see *Dixon*, 1-37, 489.

7 The certificate is sometimes dispensed with: the allowance in the margin of the lease being deemed sufficient evidence of the lease having been settled.

8 For forms of orders, see *Seton*, 244, 245.

return of the warrant to proceed on the order, or at an adjournment thereof, the proximate sum required is ascertained, and the mode of raising it determined upon.

Where the amount is to be raised by sale, the sale is conducted and the purchase money paid into Court, and subsequently dealt with, in the manner hereafter stated.

Where the amount is to be raised by mortgage, and a person willing to advance the money has been found by the parties, an abstract of the title to the estate proposed to be mortgaged is furnished to his solicitor, by whom, or whose counsel, the title is investigated, and the draft of the mortgage prepared.¹ A copy of the draft is then left in the Master's office, and is settled there, in the same manner as other deeds. At this point, the precise sum required is usually ascertained, for which purpose subsequent interest will be computed; and the costs, including the costs of the mortgage, will be taxed by anticipation, and certified by the Taxing Master.² The total amount to be raised having been ascertained, the draft is engrossed and approved by the Master, as in other cases. An order will then be made on motion approving the mortgage; giving leave to the mortgagee to pay the money into Court; and directing that, upon such payment, the mortgage be executed by the proper parties, who will be named in the order.³ Upon production at Chambers of an office copy of the Registrar's certificate of the payment having been made, and an affidavit of the due execution of the mortgage, a certificate will be made of the manner in which, or the persons to whom, the amount raised by the mortgage is to be applied or paid; and on production of a copy of such certificate, the Registrar will pay the money accordingly. This is a general description of the practice. The precise mode of paying money into and out of Court will be pointed out in another place.

Apportionment of Deficient Fund.—Where, from a deficiency in the assets or any other cause, a fund has to be apportioned amongst

1 As to inserting a power of sale, see *Russell v. Platts*, 18 Beav. 21; and as to the mortgagee's counsel, see *Nicholson v. Jeyes*, 1 Eq. Rep. 34, L.J.J.

2 *Seton*, 246. The costs of the mortgagee should be included in the costs of the plaintiff, or other party having the conduct of the cause: *ib.*

3 For form of order, see *Seton*, 246, No. 13.

a class,¹ the fund, if small, is usually directed to be apportioned in amounts to be verified by affidavit.² In other cases, the apportionment is directed to be made by the Master, in which case, upon the return of the warrant to proceed on the order directing the apportionment, a concise statement is directed to be brought in, showing the fund to be apportioned, the charges upon it, and the persons amongst whom and in what amounts, it is divisible. If any costs are payable out of the fund, they will be taxed by anticipation. A certificate of the apportionment, showing in a schedule the amount payable to each person, and the debt or sum in respect of which it is an apportionment, is then made and filed, and upon production of a copy thereof to the Registrar he will pay the apportioned amounts accordingly.

Appointment of New Trustees.—Where, by a decree or order, new trustees are directed to be appointed,³ upon the return of the warrant to proceed on the order, or at an adjournment thereof, evidence should be adduced, showing the eligibility of the proposed new trustees, and their consent to act if appointed. The consent should be in writing, and their signatures thereto are usually required to be verified by affidavit. A concise statement, showing the interest of the parties, and the nature of the property subject to the trust, is also sometimes directed to be brought into the Master's office. When the persons to be appointed are approved, an order appointing them will be made;⁴ and the order will afterwards be drawn up by the Master. After the order has been made, the Court will not enter into the comparative merits of the several persons who have been proposed by the different parties.⁵

Where the decree or order directs a conveyance of the trust estate, to the new trustees, to be settled by the Master,⁶ a draft of such

1 As to the distinction between real and personal, and legal and equitable assets, see *Haddan*, 66-79; 2 L. C. Eq. 88-104; *Ram on Assets*, 181-203; *Smith's Comp.* 500; *Trower*, 268-276; *Williams' Real Assets*, 1-14; and for the principles on which assets are applied and distributed in equity, see *Haddan*, 90-139; *Ram*, xix.-xxvii.; *Smith's Comp.* 502-514; *Trower*, 295-306; *Williams' Real Assets*, 95-118.

2 See terms of orders in *Seton*, 141, 142, 242.

3 Upon proper evidence of fitness, and acceptance of the trust in writing, the Court will nominate the trustees in the order: see *Seton*, 780. As to the appointment of new trustees, and vesting the trust estate, see *Lewin*, 419-436; *Seton*, 780-2. As to the duties and powers of, and allowances to, trustees and executors, see *Lewin*, 220-330-406-413; and see 2 L. C. Eq. 203-223, 733-766; *Seton*, 752-8, 764-770. For forms of decrees and orders relative to the appointment of new trustees; breaches of trust; charging with interest; and costs and expenses; see *Seton*, 743-770, 772-782.

4 *Watson v. Moore*, cited *Seton*, 779.

5 *Attorney-General v. Dyson*, 2 S. & S. 528; *Middleton v. Reay*, 7 Hare, 106; 13 Jur. 116.

6 It seems that this is directed absolutely where infants or married women are interested, and in all other cases conditionally upon the parties differing: see *Seton*, 778.

conveyance is left at his Chambers ; and the conveyance is settled and certified, in the same manner as other deeds.¹

It may be mentioned here, that trustees appointed by the Court are not, except in the case of trustees for charities, authorised to appoint successors.²

Infants.

Appointment and Removal of Guardians.—The power of appointing guardians,³ and making orders for maintenance, constitutes a part of the general and important jurisdiction which the Court of Chancery exercises for the protection of the property of infants, and the safe custody of their persons, during their minorities;⁴ and this jurisdiction has long been exercised in a summary way.

This is the English practice under the Imp. Stat. 15 & 16 Vic. ch. 80. Our order 197 is taken from sec. 26 of that Act, and gives the Judge in Chambers power to dispose of matters relating to the "Guardianship, maintenance and advancement of Infants." The words used in the English Act are "applications as to guardianship and maintenance of infants." So that the power of our Court is rather more extensive in terms, than that of the Court in England.

It may be observed, that this power is quite irrespective of that conferred on the Court by our Statute ch. 74 of Con. Stat. U. C. secs. 8, 9, 10, and 11,—the provisions of which will be noticed in another place.

It would seem that the proper mode of proceeding in this Province is by petition ; though in England it is optional to proceed either by petition or summons. It is not necessary to file a bill in either country.

¹ For forms of conveyance, see 2 *Prideaux* Conv. 411-422 ; 4 *Davidson* Conv. 585-632.

² *Bayley v. Mansell*, 4 Mad. 236 ; *Bowles v. Weeks*, 14 Sim. 591 ; *Oglander v. Oglander*, 2 De G. & S. 331 ; 12 Jur. 796 ; *Holder v. Durbin*, 11 Beav. 594 ; and see *Seton*, 348, 361 ; *Lowin*, 548.

³ As to the various kinds of guardianship of infants, see *Macpherson* on Infants, 2-114, III-IXII. ; *Chambers* on Infants, 64-90, 861 ; 2 L. C. Eq. 563-570. As to the appointment of guardians by the Court of Chancery, and its control over guardians, see *Macpherson*, 95-151 ; IX-IXII. ; *Chambers*, 81-106, 158-200, 362-4 ; 2 L. C. Eq. 570-588 ; *Seton*, 702, and the late rule of our Court.

⁴ For the origin and history of this jurisdiction, see Co. Litt. 30, a *Hargrave's* note (70), sec. 16 ; 3 *Fonb* Eq. 226, n. ; F. N. B. 232 ; *Story* Eq. Jur. sec. 1327, *et seq.* ; *Macpherson* on Infants, 26 ; 1 *Spence*, Eq. Jur. 611, *et seq.* ; *Wellesley v. Duke of Beaufort*, 2 Russ. 120 ; 8 C. c. *Wellesley v. Wellesley*, 2 Bligh, N. B. 124 ; *Ex parte Birchell*, 3 Atk. 813 ; *Re Bond*, 11 Jur. 114, V. C. K. B. ; *Jones v. Powell*, 9 Beav. 345 ; *Re Neale*, 15 Beav. 250 ; *Carr v. Living*, 28 Beav. 644.

In a suit for the purpose, (amongst other things) of having a guardian appointed, it is not the course of the Court to direct a reference to the Master to appoint a Guardian, but only to approve of one to be afterwards appointed by the Court if it sees fit. It is irregular to give a reversionary guardianship of wards of Court to the successors in office of any named person.¹

¹ Where a suit is instituted for the direction of the Court in relation to the estate or person of an infant and for his benefit, or for the administration of property in which he is interested, the infant, whether plaintiff or defendant, becomes a ward of Court the instant that the suit is commenced.² In this character, he is considered to be under the particular care of the Court; and he is equally entitled to its protection, whether he is under the immediate tutelage of a father, of a statutory or common law guardian, or of a guardian appointed by the Court; but the Court does not assume to itself the actual guardianship of infants³

The Court will, upon the petition of the Guardian duly appointed by the Court of Probate or Surrogate interfere summarily, and order the person of the infant to be delivered into the custody of such Guardian, when there is danger of the infant being removed out of the jurisdiction, although no suit is pending in Court respecting the infant's Estate.⁴ The provisions of the Provincial Stat. 22 Vic. ch. 93 have not the effect of excluding the jurisdiction of this Court, in respect of the appointment of Guardians to infants.⁵ On a bill by a wife for alimony and the custody of children who are under twelve years of age, the Court has jurisdiction to grant the latter relief without a petition.⁶ There was a contest in a Surrogate Court between the step father and uncle for the guardianship of a child of ten or eleven years old; the child preferred her step-father, and the Surrogate Court appointed him guardian; but this Court on appeal, being

1 *Murphy v. Lanphier*, 12 Grant, 241.

2 *Macpherson*, 103; *Hughes v. Science*, *ib.* App 1: *Ambl.* 302, Ed. Blunt, n.; 2 *Eq. Ca. Abr.* 756, pl. 14.

3 *Macpherson*, 108; and see *Story* Eq. Jur. sec 1362; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 118; *Goodall v. Harris*, 2 P. Wms. 500, 562; *Butler v. Freeman*, *Ambl.* 302; *Hughes v. Science*, *ubi sup.*; *Wright v. Naylor*, 6 Mad. 77; *Wellesley v. Wellesley*, and *S. O. nom. Wellesley v. Duke of Beaufort*, 3 *Wigh N. S.* 134, 2 *Russ.* 120; *Gynn v. Glibard*, 1 Dr. & S. 356; 7 *Jur. N. S.* 91; *Stuart v. Moore*, 4 *Macq. H. L.* 1: 7 *Jur. N. S.* 1120; *S. S. nom. Marquis of Bute v. Stuart*, 2 *Giff.* 582; 7 *Jur. N. S.* 355. It seems, also, that if no suit is pending, an infant may be made a ward of Court, on a petition presented for that purpose: *Re McCullochs*, *Dra.* 276; see also *Re Bishop*, *Macpherson*, App. 5.

4 *Re Gilis*, 3 Grant, 270.

5 *Re Stannard*, *Infants*, 1 *Cham. Rep.* 15.

6 *Memro v. Memro*, 15 Grant, 481.

satisfied from the evidence that it was for the real interest of the child that the uncle should be guardian, revised the order below.¹ The Court has an absolute right in its discretion to give the custody of a child under twelve years of age to the mother. The Court exercised this right where the only evidence that the parents were living apart through the fault of the husband, was the evidence of the wife; holding, that the Court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is on her own statement justifiable; and the Judge is not prepared to say that he disbelieves such statements.²

Where a fund, in which a female infant was interested, had been paid into Court under the Trustee Relief Act,³ and an order made for maintenance thereout, it was held that she thereby became a ward of Court.⁴

In order that the benefit arising from the protection of the Court may be extended to all cases in which interference is desirable, it is permitted to any person to commence proceedings on behalf of infants; subject, however, to the risk of incurring the censure of the Court, and of being compelled to pay the costs of the suit, in the event of its subsequently appearing that the proceedings were improperly instituted.⁵

So far as the jurisdiction of the Court relates to the appointment of guardians and the protection of the persons of infants, it does not seem absolutely necessary to allege, as a foundation for the interference of the Court, that the infant is possessed of property;⁶ but there can scarcely occur a case where the Court can be called upon to interfere, unless the infant is possessed of some property. According to Lord Eldon, in *Wellesley v. The Duke of Beaufort*,⁷ the Court is not in the habit of exercising jurisdiction over the persons of infants, except in cases where the existence of

1 *Re Irwin*, 16 Grant, 461.

2 *Re Davis*, 3 Chanc. Rep. 277.

3 10 & 11 Vic. ch. 96. This statute is in force in this Province—per Strong, V.C., *Re Wade*, 18 Grant, 487.

4 *Re Hodges*, 3 K. & J. 213; 3 Jur. N. S. 890; and see *Re Hoare*, 4 Giff. 264.

5 *Starten v. Bartholomew*, 6 Beav. 143; *Sale v. Sale*, 1 Beav. 586; *Fos v. Summerhop*, 1 Beav. 583; *Raeon v. Kerl*, 2 Phill. 692.

6 *Re Spence*, 2 Phill. 267, 262; *Re Fynn*, 2 De G. & S. 457, 481; and see *Hope v. Hope*, 4 De G. M. & G. 328, 343.

7 2 Russ. 20, 21.

property has brought them within the power of the Court; but it is not from want of any jurisdiction that it does not act, but from want of means to exercise its jurisdiction, because the Court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically, only where it has the means of doing so, that is to say, by its having the means of applying property for the use and maintenance of the infants. Where, however, the infant was the child of an English father, who had been naturalized in America, the Court appointed guardians for her, although her property was real estate situate in America, and she had been clandestinely removed thence by her paternal relatives, in breach of an injunction from an American Court restraining her removal, and guardians had been appointed in America.¹

Where a suit has been instituted by bill relating to property in which infants are interested, and guardians or maintenance are required, it is usual for the decree to give leave to the infant to make such application in Chambers for the appointment of a guardian, and for an allowance for maintenance, as he may be advised,² in which case, the decree is prosecuted in the usual manner.

An application in a suit, whether commenced by bill or administration order, may also be made at Chambers, at any time, for the appointment of a guardian, an allowance for maintenance, or matters connected therewith. If the infant is a party to the suit, the application is made by an ordinary motion. If he is not a party the first application is made by a petition in the form used for proceedings originating at Chambers, which is intitled in the matter of the infant by his next friend, and in the suit; but subsequent applications in the same matter and suit are made by an ordinary motion.

In a suit for maintenance out of the property of the infants, the Master is usually directed to inquire and state what would be a

¹ *Re Dawson*, *Dawson v. Jay*, 2 Sm. & G. 199; S. C. *nom.* *Dawson v. Jay*, *Re Dawson*, 1 Jur. N. S. 37; 3 De G. M. & G. 764; and see *Johnstone v. Beattie*, 10 Cl. & F. 42; S. C. *nom.* *Beattie v. Johnstone*, 1 Phill. 17, 30. 5 Jur. 671; *Stuart v. Moore*, 4 Macq. H. L. 1; 7 Jur. N. S. 1129; S. C. *nom.* *Marquis of Bute v. Stuart*, 7 Jur. 355; 3 Glf. 552.
² *Seton*, 702; and form, *Seton*, 609, No. 1.

proper sum to allow: but no authority is given for the payment until the report is brought before the Court for its approval—the object being the more effectual protection of the interest of the infants.¹

Where no suit is pending, the application should be made by petition under the summary jurisdiction of the Court.² The petition must be in the form used for proceedings originating at Chambers; and it is prepared, issued, and served, where the service is necessary, in the usual manner. The petition is intituled in the matter of the infant by his next friend: whose written authority to commence proceedings must be filed.

Where the only object is the appointment of a guardian of the person, the appointment may be made under the summary jurisdiction of the Court, however large the property may be; and there is no necessity for filing a bill.³ The fact of the father of an infant being alive, is not in itself a sufficient reason to prevent the Court interfering, for, if a sufficiently strong case is made, a person will be appointed, without suit, to act as guardian during the lifetime of the father. In *Ex parte Montfort*, Lord Eldon said, "I have no doubt that, in certain cases, the Court will, upon petition, without a bill, appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian; though in modern times the Court has professed to be very cautious upon that."⁴ Nor will the Court decline to appoint a guardian because the infant, being fourteen years old, and entitled to real estate, has by deed appointed a guardian for himself.⁵

The Court of Chancery has jurisdiction over the custody of children of British subjects, although born and domiciled out of England; and will, upon their coming within the jurisdiction,

¹ *Murphy v. Lanphier*, 12 Grant, 241.

² It may be observed that, in such cases, ordinary jurisdiction by bill is not excluded except by express enactment: *Hyde v. Edwards*, 12 Beav. 160: though the party refusing to avail himself of the summary jurisdiction may have to pay the costs: *Thomas v. Walker*, 18 Beav. 521.

³ *Re Duke of Newcastle*, 15 Ves. 447, n. (b.); and see *Ex parte Montfort*, 15 Ves. 445-447.

⁴ 15 Ves. 447. For form of order in such a case, see *Seton*, 700, No. 3. The following cases may be referred to for the principles on which the Court appoints a person to act as guardian during the lifetime of the father: *Wilcox v. Drake*, 2 Dick. 681; *Lyons v. Blouin, Jac.* 245, 264, and cases there cited; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; S. C. *nom. Wellesley v. Wellesley*, 2 Bligh, N. S. 124; *Re England*, 1 B. & M. 409; *Re Fynn*, 2 De G. & S. 457; 12 Jur. 718; *Thomas v. Roberts*, 3 De G. & S. 758; *Anon.* 2 Sim. N. S. 54.

⁵ *Cohan v. Cohan*, 18 Sim. 689.

appoint guardians for them ;¹ and the Court will appoint a guardian for an infant who is out of the jurisdiction, if his property is situate here, or under the control of the Court ; but it is usual to require that the parent or one of the guardians, should be within the jurisdiction.²

By the 12 Car. II., ch. 24, it is provided that the father of any child under the age of twenty-one years, and not married at the time of his death, may, whether such father is within the age of twenty-one years, or of full age, by deed or by will,³ dispose of the custody and tuition of such child in such manner as he shall think fit, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder. And such disposition of the custody of such child will be good and effectual against all persons claiming the custody or tuition of such child as guardian in socage or otherwise ; and such person or persons to whom the custody of such child is so disposed or devised, may maintain an action of ravishment of ward or trespass against any person or persons who may wrongfully take away or detain such child, and may recover damages for the same in the said action for the use and benefit of such child. And such person or persons to whom the custody of such child is so disposed or devised, may take into his or their custody, to the use of such child, the profits of all lands, tenements, and hereditaments of such child, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child till his age of twenty-one years or any lesser time, according to such disposition as aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common socage might do.⁴

The 12 Car. II. ch. 24, only enables the father to dispose of the custody of his unmarried children ; but it seems that, if a male child be unmarried at the time of the death of his father, the testamentary guardianship does not determine until he attains the age of

1 *Johnstone v. Beattie*, *Dawson v. Jay*, and *Stuart v. Moore*, *ante*; *Hope v. Hope*, 4 De G. M. & G. 828; and see *Dawson v. Jay*, *Re Dawson*, 8 De G. M. & G. 764, as to a guardian taking an infant ward out of the jurisdiction.

2 *Lagan v. Fairlee*, Jac. 198; *Lockwood v. Fenton*, 17 Jur. 127, V. C. S.; and see *Stephens v. James*, 1 M. & K. 627; *De Weever v. Rockport*, 6 Beav. 391.

3 The guardian himself may be one of the attesting witnesses: *Morgan v. Hatchell*, 19 Beav. 86: 1 Jur. N. S. 125.

4 Secs. 8, 9, 10. Formerly a Roman Catholic could not be a guardian, but the disqualification was removed by the 10 Geo. IV. ch. 7.

twenty-one years, notwithstanding his marriage;¹ though in such a case, the guardianship of a female would necessarily determine by marriage.² The Act confers authority upon no person except a father; and with respect to a father, it has reference only to legitimate children.³

A testamentary guardian is subject to the control of the Court,⁴ both with respect to the property and the person of the infant;⁵ and the Court may remove him and appoint another guardian in his stead, or may, without removing him, appoint another person to have the care of the infant.⁶ As a general rule, however, the Court does not remove testamentary guardians, but makes orders to regulate their conduct.⁷

Although the Court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shown that a compliance therewith would be prejudicial to the happiness and moral training of the infants.⁸

Where a testamentary guardian has once taken the trust upon him and acted as guardian, if it is sought to remove him for misconduct, a bill must be filed; but not where he has declined to act; for that is, as if there had been no appointment of him as guardian.⁹ In such cases, a guardian should be appointed, in a summary way; and the mere circumstance of a dispute concerning the person to be appointed guardian is no reason why the application should not be made without suit;¹⁰ although it is a reason why no order should be made without an inquiry.¹¹

Upon the application for the appointment of a guardian, evidence must be adduced to show: the ages of the infants; the nature and

1 *Earl of Shaftesbury's case*, cited 3 Atk. 625.

2 *Mendes v. Mendes*, 1 Ves. 8. 91.

3 *Ward v. St. Paul*, 2 Bro. C. C. 583; *Peckham v. Peckham*, 2 Bro. C. C. 583, n.; 2 Cox. 46; *Chatterlie v. Young*, 1 J. & W. 106; *Mabpherson*, 87; *Chambers*, 38.

4 *Duke of Beaufort v. Bertie*, 1 P. Wms. 703, 704.

5 *Talbot v. Earl of Shrewsbury*, 4 M. & C. 672; *Witty v. Marshall*, 1 Y. & C. C. C. 68, 71; *Gardner v. Blane*, 1 Harv. 331, and cases cited *ib.* 332, n. (a); *Jones v. Powell*, 9 Bear. 245.

6 *Roach v. Garvan*, 1 Ves. 8. 160; *Smith v. Bate*, 2 Dick. 631; and see *Ingham v. Bickerdike*, 6 Mad. 275.

7 *Roach v. Garvan*, 1 Ves. 8. 180.

8 *A. anonymous*, 6 Grant. 632.

9 Per Lord Redesdale, in *O'Keefe v. Casey*, 1 Sch. & Lef. 106; and see *Re McCulloch*, Dru. 276.

10 *Lady Teynham v. Lennard*, 4 Bro. P. C. Ed. Toml. 302, cited in *Byre v. Countess of Shaftesbury*, 2 P. W. 120; *Ex parte Earl of Ilchester*, 7 Ves. 348, 358; *Re McCulloch*, *ubi sup.*

11 *Beattie v. Johnstone*, 1 Phil. 17, 30; 5 Jur. 671; 8 C. nom. *Johnstone v. Beattie*, 10 Cl. & F. 42.

amount of their fortunes and incomes; and have. What "relations" are to be included; matter of discretion in each case; as a general rule, at least be shown what persons there are of or with relationship as the proposed guardian; and if proposed as a guardian, the evidence should extend to uncles and aunts on the father's and mother's sides. The petition should be served upon such relations: unless their acquiescence in the appointment of the proposed guardian is otherwise proved, or service on them is dispensed with. Evidence is also required of the fitness of the proposed guardian; and his willingness to act should be proved by the production of his written consent. The usual evidence of fitness has sometimes been dispensed with: thus, where a reputed father had appointed, by will, a guardian to an illegitimate child, and no objection was made, the Court acted upon such nomination without further evidence, and thereby carried into effect that which the father intended, but could not strictly, by law, accomplish.¹ So, also, the Court at once appointed a guardian upon the nomination of the infant, who was fourteen: he appearing himself in Court for the purpose.²

If the mother of the infant, or any other female, is appointed guardian by the Court, and marries after her appointment, her guardianship determines, and a new appointment is necessary; but it seems she will usually be reappointed.³ So, also, where one of several guardians appointed by the Court dies, the right of the survivors determines, and it becomes necessary to apply again to make a new appointment.⁴ If, however, no objection appears, it is usual to reappoint the survivors.⁵ But in the case of testamentary guardians, even though there are no words of survivorship in the deed or will appointing them, the office will, upon the death of one, survive to the others.⁶

Where there is no suit pending which will enable the Court to take upon itself the management of the infant's property, a guardian

1 *Chatteris v. Young*, 1 J. & W. 106, and cases cited; *Macpherson*, 109; and see *Beattie v. Johnstone*, 1 Phil. 17, 20; 6 Jur. 671.

2 *Ex parte Edwards*, 3 Atk. 519.

3 *Re Gornall*, 1 Beav. 347; *Jones v. Powell*, 9 Beav. 345; and see *Anon.*, 8 Sim. 346.

4 *Bradshaw v. Bradshaw*, 1 Russ. 528.

5 *Hall v. Jones*, 2 Sim. 41.

6 *Byre v. Countess of Shaftesbury*, 2 P. Wms. 108, 107.

of the estate, as well as of the person, may be appointed on petition; but where such suit is pending, a guardian of the person only will be appointed.¹ Formerly, it was considered that the Court had no jurisdiction to appoint a receiver of an infant's property, unless a bill was filed;² but this rule has been frequently relaxed in modern practice, and guardians and receivers have been appointed on petition, without suit.³ The more usual course, however, is to appoint a guardian of the person and estate, without a receiver.⁴

The application must be supported by evidence, showing the nature, rental, or income, and other material particulars of the estate, and also the fitness of the proposed guardian, and his consent to act.

It is usual to appoint the same person to be guardian of the estate, as of the person of the infant; but this rule is sometimes departed from.⁵

The person appointed guardian of the estate must, ordinarily, give security duly to account, in the same manner as a receiver. The amount of the security is regulated, as in the case of a receiver, by the sum which the guardian is likely to receive during the currency of his periodical account. Where, however, the property is small, the Court has sometimes been satisfied with the undertaking of the guardian to account;⁶ and where the estate consists exclusively of realty or leaseholds, the whole of the rents of which are allowed to the same guardian for the infant's maintenance, a recognizance is not generally required. The appointment is completed, and the guardian's accounts passed, in the same manner as in the case of a receiver.

An application to remove a guardian of the person or estate, or to supply a vacancy occasioned by death, or by the marriage of a female guardian, should be made by motion, supported by evidence of the facts which render the application necessary, and of the fitness of the proposed guardian, and his consent to act.

1 See 2 L. C. Eq. 572; *Macpherson*, 105.

2 *Ex parte Whitehead*, 2 Atk. 315; *Ex parte Mountford*, 15 Ves. 445.

3 *Seton*, 706, and cases there cited.

4 *Ibid.*

5 See *Seton*, 701.

6 *Re Sidingham*, cited *Seton*, 706.

When the persons of infants are, by due and proper course of law, brought before the Court, it will take especial care that they remain within its jurisdiction, and obey its directions therein; and will not in general, whether they be actually wards or not, permit them to be taken, or go out of it.¹ Under special circumstances, however, the Court has permitted infants to go out of the jurisdiction, for the purpose of temporary, or even of permanent residence there, or, when already abroad, to remain there, under restrictions whereby their property and their education, and marriage still remained within its control; but this must be on the ground of undoubted advantage to the infants, and on the responsibility of the guardian for the proper care of their persons; and the Court must be satisfied, if possible, that they will at the proper period be brought again within its power.² For this purpose, Ireland,³ and Scotland,⁴ are looked upon as foreign countries.⁵

An application for leave to remove an infant out of the jurisdiction may be made by motion supported by affidavit of the grounds on which such removal is deemed proper.⁶ The person taking the ward out of the jurisdiction usually signs an undertaking, indorsed on the notice of motion,⁷ to bring him back by the time prescribed by the Court; but this rule is occasionally relaxed in practice; and the undertaking of counsel has been sometimes considered sufficient.⁸ In *Lethem v. Hall*,⁹ a recognizance was entered into by the guardians, to bring the infant within the jurisdiction whenever required, on his being placed at the University of Dublin.

Maintenance and Advancement.—Where there is a fund in Court, or under the control of the Court, belonging to an infant, or the income whereof is applicable to his maintenance, an application may be made, by motion, for an allowance thereout for such maintenance.

1 *Chambers*, 26; and see *Macpherson*, 129-132; 3 L. C. Eq. 588; *Seton*, 719-721.

2 *Chambers*, 28; *Macpherson*, 129; *Stephens v. James*, 1 M. & K. 627; *Wyndham v. Lord Ennismore*, 1 Kien. 467; *Campbell v. Mackay*, 2 M. & C. 31-33; *Talbot v. Earl Shrewsbury*, 4 M. & C. 672; and see *Re Bentley*, cited *Seton* 720; and also *Jac.* 265.

3 *Lethem v. Hall*, 7 Sim. 141.

4 *Mountstuart v. Mountstuart*, 6 Ves. 313; 1 Hon. Sup. to Ves. J. 603.

5 *Chambers*, 28.

6 For forms of orders, see *Seton*, 719-720; 4 M. & C. 677; *Macpherson*, App. 18.

7 Or written in the Registrar's book, where the application is made in open Court: see *Seton*, 719, No. 1.

8 *Macpherson*, 132.

9 7 Sim. 141.

For the purpose of providing for the maintenance of infants during minority, out of property held in trust for them, it is customary to insert in settlements, express powers, authorising the legal holders of the funds to apply either the whole or some portion of the income or capital for the maintenance and advancement of the infants, according to such conditions as may be considered convenient. In the absence of any such powers, the income of an infant's estate may be applied towards his maintenance; and such payments (if clearly necessary,) would be allowed the trustee or guardian in passing his accounts.¹

The practice of ordering maintenance, without suit, is more recent than that of so ordering the appointment of a guardian. According to Lord Hardwicke, Sir Joseph Jekyll was the first judge who went so far in this summary way as to direct an allowance for maintenance; before his time, the Court would do no more than appoint a guardian in socage, till the infant had attained his age of fourteen.² The practice, however, though completely established, was considered to be confined to cases where the income of the infant was small; in other cases, it was deemed necessary that a bill should be filed.³ The more recent cases show that this rule no longer exists; and that the distinction, which formerly subsisted, between the cases where the income of the infant was derived from real estate, and where it was derived from personal estate, has been abolished.⁴ Where, however, the infant's right to maintenance is doubtful, a bill should be filed.⁵

As a general rule, the Court will not, during the lifetime of the father, order maintenance for his children out of their property: as it is his duty to support them.⁶ When, however, the father is not of sufficient ability to educate them according to their estate, an allowance for their maintenance will be authorised;⁷ and for this

¹ See *Prince v. Hine*, 26 Beav. 634.

² *Ex parte Richards*, 3 Atk. 519.

³ See *Ex parte Mountfort*, 15 Ves. 446 448; *Ex parte Lakin*, 4 Russ. 307; *Re Moleworth*, 4 Russ. 308.

⁴ *Ex parte Starkie*, 3 Sim. 339; *Re Christie*, 6 Sim. 43; *Ex parte Angell*, 18 Sim. 258.

⁵ *Fairman v. Green*, 10 Ves. 45-47; *Corbet v. Tottenham*, 1 B. & B. 60.

⁶ *Jackson v. Jackson*, 1 Atk. 515; *Faukner v. Watts*, *ib.* 408; *Butler v. Butler*, 3 Atk. 60; *Darley v. Darley*, *ib.* 399; *Andrews v. Partington*, 2 Cox, 223; *Thompson v. Griffin*, C. & P. 317; *Ekewich v. Langston*, 11 Sim. 291, 303, 305.

⁷ *Fendall v. Nash*, 5 Ves. 197, n. (a); *Cavendish v. Mercer*, *ib.* 196, n. (a); *Errat v. Barlow*, 14 Ves. 202; *Jervois v. Silk*, G. Coop. 52; *Ex parte Williams*, 2 Col. 740; *Luckner v. Brown*, 12 Jur. 1017, V. C. W.

purpose, it is not necessary that the father should be absolutely without the means of supporting his children: an order for maintenance may be made, if his circumstances are such as to prevent him from educating them in a manner suitable to the fortune they have a right to expect.¹ The rule that, if a father is of sufficient ability, he must educate and maintain his children out of his own fortune, applies, even though the gift of the property to them contains provisions authorising their maintenance thereout: unless it is expressly given to their father for that purpose.² This ground of exception is thus stated by Lord Thurlow, in *Andrews v. Partington*.³ "If the will had given the dividends to the father for the maintenance of the children, it would have amounted to a legacy of the dividends to the father: which he would have been entitled to, though he had not spent half of it in the children's maintenance." This distinction was also acted upon by Sir Lancelot Shadwell, V.C., in *Hawkins v. Watts*,⁴ where a testator gave a share of his personal estate to his son-in-law, in trust to apply the same for the maintenance of his children by the testator's daughter; and it was held that the son-in-law was entitled to apply the interest of the share for his children's maintenance, notwithstanding he might be of ability to maintain them.

Another exception to the general rule, rendering it incumbent upon a father to maintain his children, exclusively out of his own property, occurs where the father has contracted that certain property should be applied to that purpose;⁵ but before he can be entitled to this benefit, he must show that such was his contract.⁶

In general, the Court will not direct a sum to be paid for maintenance out of the capital of the infant's property. If, however, the infant has no other means of subsistence, or it can be shown to be necessary for his advancement in life, the capital may be broken into.⁷

1 *Buckworth v. Buckworth* 1 Cox, 80.

2 *Hughes v. Hughes*, 1 Bro. C. C. 987; *Andrews v. Partington*, 3 Bro. C. C. 60; *Mundy v. Earl Howe*, 4 Bro. C. C. 224; *White v. Grane* 18 Beav. 571.

3 2 Cox, 223, 224; 3 Bro. C. C. 60; but see *Hoste v. Pratt*, 3 Ves. 730. 4 7 Sim. 190.

5 *Stocken v. Stocken*, 4 M. & C. 95, 98; and see S. C. 4 Sim. 152; 2 M. & K. 439; *Mundy v. Earl Howe*, 4 Bro. C. C. 224; *Meacher v. Young*, 2 M. & K. 490; *Birch v. Sumner*, 3 Jur. N. S. 112, V. C. W.

6 *Thompson v. Griffin*, C. & P. 317, 321.

7 *Ex parte Green*, 1 J. & W. 253; *Ex parte Swift*, 1 R. & M. 575; *Ex parte Chambers*, ib. 577; *Clay v. Pennington*, 8 Sim. 369; *Fentiman v. Fentiman*, 13 Sim. 171; *Bridge v. Brown*, 2 Y. & C. C. 181; *Ex parte Hays*, 3 De G. & S. 436; *Re Lans*, 17 Jur. 219, M. R.; *Walsh v. Walsh*, 1 Drew. 64; and see *Worthington v. McCraer*, 25 Beav. 81; *Prince v. Hine*, 26 Beav. 634; *Seton*, 704; *Macpherson*, 252-5; *Chambers*, 354.

Although, as a general rule, the Court will not break in upon principal money for the maintenance and education of infant legatees, still in a proper case the Court will so apply it as well as to the advancement of the infant.¹ A step-father's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct. A step-father is under no obligation to support the child of his wife by her former husband.² The Master has no authority to make an allowance for the maintenance of an infant not directed by the decree, however reasonable it may appear to him to be. His proper course is to report the circumstances specially, and the party claiming to be entitled can apply to the Court on further directions.³ Where a legacy bequeathed to an infant had been paid into Court the interest thereon was ordered to be paid out as it accrued, for the education and maintenance of the infant on its being shewn that the money was required for these purposes.⁴ In a proper case trustees may be allowed payments made by them for the maintenance and education of children, out of their capital. Under a general administration decree the Master may, without any special directions, take evidence as to payments by executors for the maintenance and education of infants out of their shares of capital, and report the facts.⁵ It is for the discretion of the Court, in view of all the circumstances whether to allow for past maintenance out of the corpus of an infant's estate not intended by a testator to be so applied. A farmer by his will gave to his widow his goods and chattels absolutely; also an annuity, and the use of his homestead and other real estate during her widowhood. She married again and claimed to be paid for the past maintenance of the testator's children from the time of his death out of the corpus of the estate devised to them at twenty-one, and otherwise. The Court on further directions refused to allow the claim.⁶ [Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; and that in the case of the death of either, the whole should be paid to the survivor; the will containing no gift over in

¹ *Ashbaugh v. Ashbaugh*, 10 Grant, 430.

² *Fidler v. O'Hara*, 18 Grant, 610.

⁴ *Griffin v. McGill*, 2 Cham Rep. 318

Edwards v. Durgan, 19 Grant, 101.

³ *Fidler v. O'Hara*, 2 Cham. Rep. 256.

⁵ *Stewart v. Fletcher*, 16 Grant, 235.

case of the death of both; the Court held that the trustees and executors had a direction to apply part of the principal to the support and education of the legatees. In such a case the executors and trustees presented a petition under the statute 29 Victoria, ch. 28, sec. 31, and it appearing that the parents of the legatees had abandoned them; that the legatees had no other means of support; and that the interest on their share of the residuary estate was inadequate for their support. The Court made an order approving of the application of part of the principal to supply the deficiency.¹ [In proceeding under 12 Victoria, ch. 72, the mother of the infants was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered, which was accordingly effected, but no investment of the surplus was made, although that course was directed by the order; the whole of such proceeds together with \$5,321 in addition were expended in the support and education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate. The Court refused the application; notwithstanding that the Master reported the amount claimed was a proper sum to be allowed² [Maintenance under the statute—Consolidated Statute, Upper Canada, ch. 74, sec. 8—can only be ordered where the infant is under twelve years old, and is transferred by the Court to the mother's custody.³ A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, and charged the same on the shares of two of the devisees; but the will was silent as to interest upon the legacy: *Held*, that the infant was entitled to maintenance out of the estate of the testator, during her minority, to the extent, if necessary, of the interest on the legacy; and an inquiry as to the ability of the widow of the testator to maintain the infant was refused.⁴ By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one: *Held*, that the infant took a vested interest; and the Court directed an inquiry as to her past and future maintenance.⁵ It is clear that it is the duty of the mother remaining

1 *Re McDougall*, 14 Grant, 609.

2 *Re Hunter*, 14 Grant, 680; and see *Walmesly v. Bull*, 15 Grant, 210.

3 *Re Eves*, 15 Grant, 580.

4 *Binkley v. Binkley*, 15 Grant, 649.

5 *Stewart v. Glasgow*, 15 Grant, 668; and see *Denison v. Denison*, 17 Grant, 219, affirmed on appeal, 18 Grant, 41.

unmarried after the death of her husband to maintain her children.¹

But there is no rule requiring the mother to maintain her children; and therefore, it has been held that if the father is not of sufficient ability,² or is dead,³ maintenance will be allowed without reference to her ability.

An application at Chambers for the allowance of maintenance is made by an ordinary notice of motion, in cases where a suit or matter is pending; in other cases it is made by petition in the form used for originating proceedings at Chambers. The notice of motion must be served on the trustees, or other persons interested in the fund out of which the maintenance is to be paid; and must be supported by evidence, showing that the income or corpus of the fund is applicable to the purpose. A scheme, showing the heads of the intended expenditure, should also be put in evidence.

If an increase of the allowance is afterwards required, the application for it is made by an ordinary motion supported by an affidavit showing the necessity for the increase. The notice should be served on the trustees or other persons above mentioned.

Where, on the hearing of the cause, directions are given as to the appointment of guardians, or an allowance for maintenance an inquiry what is proper to be allowed for the maintenance of the infant, and out of what fund the allowance ought to be made, will be directed.⁴

The guardian will usually be allowed any costs he may have incurred, as between solicitor and client; but any sums which he has expended, and which would not be allowed under that head, should be mentioned at the hearing of application: in which case, if necessary, a special direction will be given in the order concerning them.⁵

1 Per Spragge, C., *Binkley v. Binkley*, 15 Grant, 660.

2 *Haley v. Bannister*, 4 Mad 275, 280; *Cavendish v. Mercer*, 5 Ves. 195, n. (a). But see Per Spragge, C., *Binkley v. Binkley*, 15 Grant, 660.

3 *Douglas v. Andrews*, 12 Beav. 810; and see *Lanoy v. Duke of Athol*, 2 Atk. 447; *Ex parte Lord Petre*, 7 Ves. 463; *Macpherson*, 224; *Chambers*, 114.

4 See forms of orders in *Seton*, 700, 701.

5 In general, past maintenance will not be ordered, unless a strong case for it is made: see *Hill v. Chapman*, 2 Bro. C. C. 231; *Sherwood v. Smith*, 6 Ves. 484; *Re parie Bond*, 2 M. & K. 439; *Clay v. Pennington*, 8 Sim. 359; *Stopford v. Lord Canterbury*, 11 Sim. 83; 4 Jur. 842; *Bruin v. Knott*, 1 Phill. 672; 9 Jur. 979; 12 Sim. 456; 6 Jur. 885; *Ligon v. Lord Conestry*, 14 Sim. 41; *Stephens v. Lawry*, 2 Y. & C. C. C. 87-70; *Re Lane*, 17 Jur. 219, M. R.

It may be here mentioned, that where the infant and her father were resident abroad, the Court made an order, that upon the father appointing an attorney to receive the maintenance, the dividends of a fund in Court should be paid to the attorney half-yearly, upon the production to the Accountant-General of an affidavit by the father that he had duly applied, in the maintenance and education of the infant, all monies received by him on that account to the time of making the affidavit;¹ and where the infant resided in the United States with her guardian, appointed by a foreign Court, the dividends of a fund of £531 in Court here, were ordered to be paid to her solicitor; he undertaking to remit them to the guardian.²

Where a person of weak or unsound mind, who has not been so found by inquisition or other proceedings in lunacy, has property under the jurisdiction of this Court, the Court may, without the aid of the jurisdiction in lunacy, appoint a person to act as guardian of the person, or person and estate, of the lunatic: and may order the income of his property to be applied for his maintenance;³ or may even direct the corpus of such property to be applied in repaying past advances for maintenance.⁴ The application, in such case, is made by petition, supported by similar evidence to that required in the case of infants; and by affidavits showing the state of mind of the lunatic, that he is unable to manage his affairs, and that he has not been found lunatic by proceedings in lunacy.⁵

As long as guardians of the person, or other persons having an allowance for maintenance, duly maintain the person intrusted to their care, they are not accountable for their expenditure.⁶

In settlements it is customary to insert express powers authorising the application of the whole or some portion of the

1 *Re Weaver v. Rockport*, 6 Beav. 391, and cases *id.* 392, n. (b); and see *Seton*, 719, 720.

2 *Re Morrison*, 16 Sim. 43: 11 Jur. 984; and see *Volans v. Carr*, 2 De G. & S. 242, where the infant had been found of unsound mind by a foreign Court.

3 *Wilkinson v. Leach*, 2 O. P. Coop. t. Cott, 196; *Volans v. Carr*, *ubi sup.*; *Re Berry*, 18 Beav. 455; *Re Burks*, 2 De G. F. & J. 124; 6 Jur. N. S. 717; *Re Taylor*, 2 De G. F. & J. 125; *Re Ward*, 6 Jur. N. S. 717, L.J.; *Re Macfarlane* 2 J. & H. 678; 8 Jur. N. S. 208; *Re Bignell*, cited *Seton*, 710; and see *Re Spiller*, 6 Jur. N. S. 386, L. J. In *Re Sturge*, 5 Jur. N. S. 423: 7 W. R. 595, M. R., an annual statement was directed to be made to Chambers of the lunatic's state of mind and property.

4 *Re Law*, 7 Jur. N. S. 410, V. C. W.; *Re Macfarlane*, 2 J. & H. 678; 8 Jur. N. S. 208; *Williams v. Allen*, 33 Beav. 241: and see *Peters v. Grote*, 7 Sim. 238; 2 O. P. Coop. t. Cott. 192.

5 For forms of orders, see *Seton*, 700, 710.

6 *Jodrell v. Jodrell*, 14 Beav. 397; and see *Leach v. Leach*, 12 Sim. 304; *Carr v. Living*, 28 Beav. 644-647.

income or capital of each child's expectant or apparent share for the advancement of such child; and in the absence of express power, a like application for the infant's share may be made by the trustee without the sanction of the Court, where the same, if expended for maintenance, would not have been allowed him.¹

Where the fund out of which the advancement is to be made is in Court, or the infant is a ward of Court, or the administration of his estate, or his maintenance, is under the direction of the Court, an allowance for the purpose of purchasing him a commission in the army, or binding him apprentice, or otherwise for his advancement, may be applied for by petition, supported by affidavit or other evidence showing the amount required to be advanced, the wishes of the infant, and his fitness for the profession, trade, or business selected.² Where it is proposed to article or apprentice the infant, the respectability of the intended master, and the propriety of the premium, are also usually required to be shown by affidavit. The articles or indentures of apprenticeship are usually settled at Chambers, or before the Master in the ordinary way; and where the amount advanced is to be paid out of a fund in Court, it is usually necessary that the execution of the articles should be certified by the master.³ Provision is sometimes made by the articles for the return by the master of a portion of the premium, in the event of either the master or the infant dying during the term.

Management of Property.—The Court exercises a vigilant care over guardians of the estate in regard to the management and disposal of the property of infants; and will carry its aid and protection in favour of infants so far as to reach other persons than those who are guardians strictly appointed; for, if a man intrudes on the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible for the same to the infant in a Court of Equity.⁴

1 *Lewin*, 386. As to advancement for infants, see *Chambers*, 380-8, 821; *Macpherson*, 255, 256, 336-7 xxxi.; *Seton*, 704.

2 For form of order to purchase a commission in the army, see *Seton*, 708, No. 9.

3 For form of order, see *Seton*, 709. Where the amount is small, the drawing up of the order is sometimes deferred till after the articles have been executed, as, by so doing, the expense of a certificate of approval and of execution may be saved; see *Wens v. Wens*, M. R. in Chambers, 30 June, 1865, Reg. Lib., B. 1774.

4 *Story* Eq. Jur. sec. 1356; *Newburgh v. Bickerstaffe*, 1 Vern. 296; *Cary v. Bertie*, 3 Vern. 322; *Bennet v. Whitehead*, 2 P. Wms. 645; *Morgan v. Morgan*, 1 Atk. 489; *West*, 265; *Dormer v. Protescue*, 3 Atk. 180; *Pulteney v. Warren*, 6 Ves. 39; 1 C. P. Coop. t. Cott. 480; *Wyllie v. Elliot*, 6 Hare, 506; *Blonfield v. Byre*, 8 Beav. 250; 9 Jur. 717; *Nanney v. Williams*, 22 Beav. 543, 469; *Seton*, 687. As to the management of the estates of infants by the Court, see *Chambers* 508-96; *Macpherson*, 330-347.

There is some difficulty in determining with precision the extent of the authority which is possessed by guardian of the estate of an infant, who has been appointed by the Court of Chancery. In the case of *Ex parte Starkie*,¹ Sir Lancelot Shadwell, V.C., is reported to have said, that the order discharged the party making the payment, to the extent only of the allowance made; and it has been inferred from this, that a guardian cannot give a valid receipt to a tenant, unless there is an order for maintenance to the full extent of the infant's fortune. The language, however, of the orders appointing guardians, both in ancient and in modern times, seems to show that the power over the estate is more extensive than what could be inferred from this case. Moreover, it is the custom to make the guardian enter into a recognizance to account for what he receives of the estate: which would be unnecessary if the appointment gave him no control over the property of the infant.

The power of the testamentary guardian over the property of the infant, is more clearly defined: he derives his authority from an act of Parliament,² and has control as well over the lands descended to the infant from his father, as also over all other the real and personal estate belonging to the infant. The statute, moreover, expressly authorizes him to bring all such actions in relation thereto, as, by law, a guardian in common socage might do. The testamentary guardian seems to possess, as an incident to his office, the power of making valid leases of the estate of the infant for the term of his guardianship, upon which ejectment can be maintained; but a lease made by such a guardian to last beyond the minority of the ward is absolutely void, after the infant comes of age.³

Although, however, the testamentary guardian possesses these legal rights over the estate of the infant, he is, in all respects, subject to the control of the Court, and liable to account for what

1 3 Sim. 339. On referring to the original petition in this case, and the order entered, Reg. Lib., 1836, E. 509, it appears that the infant's estate was vested in trustees, who had no power to advance maintenance. It may, therefore, be supposed that the observation of the Vice-Chancellor referred only to a case where trustees in the possession of the estate make payments to a guardian of the person. It is obvious that in such a case the trustees would only be discharged to the extent of the allowance made for maintenance; but it does not follow that a guardian of the estate, where there is no trustee, cannot give a receipt for the full amount of the infant's fortune.

2 13 Car. II. ch. 24.

3 *Roe dem. Parry v. Hodgson*, 2 Wils. 135; *Woodfall*, 41; *Chambers*, 515.

he receives. His rights and liabilities seem to be nearly the same as those of the guardian in socage, except that they continue until the infant is twenty-one, instead of terminating, as in the case of the guardian in socage, at fourteen. According to Lord Hardwicke, "It is at the peril of a guardian in socage what he applies for maintenance; and he will be allowed according to the discretion he has used."¹

From what has been stated, concerning the power of a guardian appointed by the Court over the estate, it may be inferred, that he has no power incident to his office of making a lease valid at law of any portion of the infant's estate; nor is there any authority as to the circumstances under which a lease made by such a guardian, during the minority, would be supported in equity. Consequently, when a suit is instituted, it is usual for a receiver to be appointed, in which case, the estate is managed according to the practice hereafter stated. The Court, however, can not, under its original jurisdiction, in such a case, enable a receiver to create any legal term in the land; nor can it in any manner insure the occupation of the tenant, beyond the period of the infant's minority.

Guardians will not ordinarily be permitted to convert the personal estate of infants into real estate; since it may not only affect the rights of the infant himself, but also his representatives, if he should die under age. Guardians may, however, under special circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate; and the Court will support their conduct, if the act be such as the Court itself would have done, under the like circumstances, by its own order.² The act of the guardian in such case must not be wantonly done; but it must be for the manifest interest and convenience of the infant; and hence it is common for guardians to ask the positive sanction of the Court to any acts of this sort. Where the Court orders any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state.³ This object may be attained by

¹ *Ex parte Whitfield*, 2 Atk. 315.

² *Story* Eq. Jur. sec. 1357; *Inwood v. Twayne*, Amb. 419. As to the conversion of an infant's property, see *Macpherson*, 278-308; *Chambers*, 568-570; *Seton*, (94-5).

³ *Lord Ashburton v. Lady Ashburton*, 6 Ves. 6; and see *Tullit v. Tullit*, Amb. 370; *Sorpeson v. Sealey*, 2 Atk. 413; *Ex parte Phillips*, 19 Ves. 122; *Webb v. Lord Shaftesbury*, 6 Mad. 160.

conveying the land to a trustee, in trust for the infant, his executors and administrators, until he attains twenty-one, and afterwards for him and his heirs;¹ or, by a conveyance to the use of the infant, his heirs or assigns, but if he dies under twenty-one, then to the use of trustees, upon trust to sell, and hold the purchase-money upon the trusts on which such money, and the income thereof, would have been held if the money had remained part of the infant's personal estate.² The practice as to investments in land, with the approval of the Court has been already stated.

In cases where, if money belonged to an infant residing in Upper Canada, the Court would invest it for the benefit of the infant the Court will, where the infant is resident in a foreign country, direct the moneys to be invested for his benefit in the securities of such foreign country.³ The rule is that moneys belonging to infants are not ordered in equity to be paid to their guardian, whether appointed by the Surrogate Court or otherwise, but are secured for the benefit of the infants under the authority of the Court; but the rule may not apply where the amount is small, and is required for the maintenance, education, or other immediate use of the infants, or where some other special circumstances exist justifying an exception to the general rule.⁴ In consequence of the danger to which the fortunes of infants are often exposed in private hands, the Court, on the administration of an estate, takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee. Since the establishment of a Government Dominion Stock the investment of infants' money by the Court, should, as a general rule, be in such Stock, rather than, as formerly, in mortgages.⁵ A petition had been presented for the sale of an infant's estate, fifty acres of land which produced \$700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the Court, on which it seemed to be intended the father of the infant—a farm laborer—was to reside with the infant, the Referee refused to sanction the sale.⁶

1 6 Ves. 7.

2 This was the form adopted in *Pym v. Pym*, M. R. in Chambers, June, 1865.

3 *Sanborn v. Sanborn*, 11 Grant, 359.

4 *Mitchell v. Ritchey*, 13 Grant, 445.

5 *Kingsmill v. Miller*, 15 Grant, 171; and see *Stillemann v. Campbell*, 13 Grant, 454.

6 *Re Mason*, 3 Cham. Rep. 428.

Marriage, and Marriage Settlements.—If a ward of the Court, whether male or female, is desirous of marrying, application should be made to the Court for an order sanctioning the proposed marriage, notwithstanding that the infant has a parent or guardian. The order will not be granted unless it appears that the marriage is suitable, and that the settlement proposed is proper;¹ and in order to prevent the improper marriage of a ward, the Court will, if there is reason to suspect that a marriage without its sanction is intended, interfere by injunction to restrain the marriage, and also communication between the ward and the intended husband or wife; and if the guardian is suspected of any connivance, it will remove the infant from his custody to the custody of another person, and will restrain the guardian from giving his consent to the marriage without leave of the Court.² The application in such cases is usually made by petition, supported by affidavit.³ Hearsay evidence and declarations have weight with the Court on such applications, especially when uncontradicted by anything on the other side;⁴ and in an urgent case, the Court will grant the injunction on an *ex parte* application, on evidence of improper intercourse and connivance.⁵

Where a person marries a ward of the Court without its consent and approbation, such person, and all others concerned in aiding and abetting the act, will be treated as guilty of a contempt of the Court, and may be committed to prison: even though ignorant of the infant being a ward.⁶ In such cases, an application may be made by petition,⁷ of the infant, or of the guardian, or indeed of any other person, for an inquiry as to the validity of the marriage, and

1 2 L. C. Eq. 538; *Smith v. Smith*, 3 Atk. 306; *Earl of Plymouth v. Lewis*, 2 Dick. 901. As to the marriage of wards of Court, and settlements thereon, see *Macpherson*, 191-209; *Chambers*, 300-301.

2 *Story* Eq. Jur. sec. 1360; *Lord Raymond's Case*, Ca. t. Talb. 58; *Smith v. Smith*, 3 Atk. 304, 305, 308; *Beard v. Travers*, 1 Ves. S. 313; *Tombes v. Elers*, 1 Dick. 88; *Boach v. Garvan*, *ib.*; *Lord Shipbrook v. Lord Hinchinbrook*, 2 Dick. 547; *Pearce v. Crutchfield*, 14 Ves. 206. Formerly, where the Court committed the custody of an infant to any person, it required him to enter into a recognizance, conditioned that he should not permit the infant to marry without the consent of the Court: *Davis Case*, 1 P. Wms. 698; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 112; but this practice is not now adhered to: see forms of orders in *Seton*, 700, 701.

3 For forms of orders, see *Seton*, 727, 728, 732.

4 *Beard v. Travers*, 1 Ves. S. 313.

5 *Seton*, 728, No. 3. As to substituted service, see *Pearce v. Crutchfield*, 14 Ves. 206; *Wortham v. Pemberton*, 1 De G. & S. 644, 648.

6 *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 111; 2 L. C. Eq. 538; *Herbert's Case*, 3 P. Wms. 116; *Hill v. Turner*, 1 Atk. 515; *More v. More*, 2 Atk. 157; S. C. *nom. Moor v. Moor*, Barnard, 404; *Butler v. Freeman*, Amb. 301; *Bathurst v. Murray*, 8 Ves. 74; *Nicholson v. Squires*, 16 Ves. 259; *Birkett v. Hibbert*, 3 M. & K. 227; *Re Walker*, L. & G. t. Sug. 230; *Hodgens v. Hodgkiss*, 4 Cl. & F. 323; *Baseley v. Baseley*, 4 Cl. & F. 378; *Wortham v. Pemberton*, 1 De G. & S. 644; *Martin v. Foster*, 7 De G. M. & G. 98; 1 Jur. N. S. 387; *Gynn v. Gildard*, 1 Dr. & S. 256; 7 Jur. N. S. 91.

7 *Trevana v. Julif*, M. R., 28 March, 1865, Reg. Lib. B. 613.

the approval of a proper settlement of the infant's fortune. The application must be supported by affidavit; and the parties are usually ordered to attend personally in open Court, or in the Judge's private room, to answer the contempt.¹ The Court also usually directs an inquiry to be made whether the marriage is valid;² and if it appears that it is, it will, in the case of a female ward, direct a proper settlement of her fortune to be made with the approval of a Judge in Chambers.³ An application to commit a husband may be directed to stand over, pending the approval and execution of the settlement.⁴ If it is found that the marriage of a female ward is invalid, a valid marriage may be ordered;⁵ and a like course has been pursued in the case of a male ward.⁶ Upon the return of a warrant or appointment to proceed on the order, the inquiry as to the marriage is prosecuted; the settlement approved; and the result of the proceedings certified in the usual manner.⁷ When the certificate has become absolute, any consequential directions may be applied for by petition.

If the husband has been committed for the contempt, he may apply to the Court by petition,⁸ for his discharge, which will be granted on the settlement being executed, and the costs paid.⁹

An application for leave for a ward of Court to marry is usually made by petition: which is ordinarily presented by the intended husband whether he is the ward or not;¹⁰ but is sometimes presented by a female ward, by her next friend or guardian; and sometimes by both parties.¹¹

The petition should state the age of the ward; the nature of his or her fortune; the contemplated marriage; and the age, rank, position in life, and fortune of the person to whom the infant is proposed to be married; and should pray for an inquiry whether the contem-

1 For forms of orders, see *Seton*, 729. As to substituted service, see *Pearce v. Crutchfield*, and *Worham v. Pemberton*, *ubi sup.*

2 In *Trevens v. Juliff*, *ubi sup.*, where satisfactory evidence of the marriage was given on the hearing of the application, the inquiry was dispensed with.

3 *Seton*, 729.

4 *Trevens v. Juliff*, M. R., *ubi sup.*; *Seton*, 731.

5 *Bathurst v. Murray*, *Re Walker*, and *Hodgens v. Hodgens*, *ubi sup.*

6 *Re Murray*, 3 Dr. & War. 53.

7 The husband in these cases is, as a rule, excluded from all interest: *Birkett v. Hubert*, 3 M. & K.

227; *Kent v. Burgess*, 11 Sim. 361, 378; *Wade v. Hopkinson*, 19 Beav. 613; and see *Seton*, 729.

8 *Nicholson v. Squire*, 16 Ves. 269.

9 *Stevens v. Savage*, 1 Ves. J. 154.

10 *Seton*, 722, No. 1; 723.

11 See *Seton*, 724, No. 3.

plated marriage is a proper one for the ward ; that, if so, proposals for a settlement may be received ; that a proper settlement may be approved : and that upon the execution thereof, the parties may be at liberty to intermarry. The allegations in the petition must be supported by affidavit ; but it is usual, on the petition being opened in Court, to adjourn it wholly to Chambers, without any order thereon being then drawn up.¹

In proceeding on the petition in Chambers, the propriety of the marriage is, in the first place, considered ;² and if that is shown, the proposals for the settlement are brought in and discussed ;³ and when these are settled, the matter is adjourned for a deed to be prepared to carry them into effect. The draft of such deed is then prepared by the lady's solicitor ;⁴ a copy of the draft is left at Chambers, and and is there settled, with the aid, if necessary, of the conveyancing counsel ; the fitness of the proposed trustees and their consent to act must be shown ; and an approval of the deed is signed in the usual manner. The Registrar, or Master, if there has been a reference, then prepares and signs the minute of the order approving the marriage and settlement, and directing that, upon the execution thereof by the persons therein named,⁵ the parties be at liberty to intermarry.

Where a fund in Court is to be paid out or transferred to the trustees of the settlement, or applied in the infant's outfit, or in payment of the costs, or otherwise, the same order may provide for such payment or transfer being made, after the due execution of the settlement, and the solemnization of the marriage ; or a subsequent order for such payment or transfer may be obtained, on the application of the trustees.⁶

In order to remedy the great inconveniences and disadvantages which formerly arose in consequence of persons marrying during

¹ *Seton*, 723.

² In *Morgan v. Hatahell*, cited *Seton*, 723, the Court approved the marriage, subject to its solemnization being postponed till the infant ward attained 17.

³ For forms of proposals for a settlement, see 3 *Davidson* Conv. 762.

⁴ As to settlements of real and personal estate, see 3 *Davidson*, Conv. 1-532 ; 1 *Prideaux* Conv. 142-157 ; 2 L. C. Eq. 594. For precedents of marriage settlements in general, see 1 *Prideaux*, 160-264 ; 3 *Davidson*, 533-1196 : and with the sanction of the Court, *ib.*, 727, 747, 754, 1062 : *Peachy*, 790-810. A female ward should be empowered to provide for her children by a future marriage : *Rudge v. Winnall*, 11 Bear. 98 : and see *Bathurst v. Murray*, 8 Ves. 74.

⁵ In addition to the husband and wife, the settlement should be executed by the trustees : see *Adey v. Arnold*, 2 De G. M. & G. 432 : *Wynch v. Grant*, 2 Drew. 312.

⁶ *Seton*, 723.

minority being incapable of making binding settlements of their property, it has been enacted, in England, that it shall be lawful for every male infant who has attained the age of twenty years, and every female infant who has attained the age of seventeen years,¹ upon or in contemplation of his or her marriage, with the sanction of the Court, to make a valid and binding settlement, or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant with the approbation of the Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years; but the statute does not extend to powers of which it has been expressly declared that they shall not be executed by an infant;² and in case any appointment, under a power of appointment, or any disentailing assurance, has been executed by any infant tenant in tail under the provisions of the Act, and such infant afterwards dies under age, such appointment or disentailing assurance will thereupon become absolutely void.³

The sanction of the Court to any such settlement, or contract for a settlement, may be given upon petition presented by the infant, or his or her guardian, in a summary way, without the institution of a suit; and if there is no guardian, the Court may require a guardian to be appointed or not, as it thinks fit; and the Court also may, if it thinks fit, require that any person interested, or appearing to be interested, in the property, shall be served with notice of the petition.⁴

The powers conferred by this Statute in the English Court have been given to our Court by the Prov. Stat. 28 Vic., ch. 17.

The petition is entitled in the matter of the infant, and of the Act; the allegations are similar to those usually inserted in petitions in the case of marriages of wards of Court; and the petition

1 18 & 19 Vic. ch. 43, sec. 4.

2 18 & 19 Vic. ch. 43, sec. 1.

4 18 & 19 Vic. ch. 43, sec. 3.

3 18 & 19 Vic. ch. 43, sec. 2.

prays that a proper settlement may be sanctioned, and that, upon the execution thereof, the parties may be at liberty to intermarry.

On the petition being opened in Court, it is usually adjourned at once into Chambers; and an appointment to proceed thereon is taken out, in the usual manner. At the return of the appointment, or at an adjournment thereof, evidence must be produced to show: (1) The age of the infant; (2) Whether the infant has any parents or guardians; (3) With whom or under whose care, the infant is living, and, if the infant has no parents or guardians, what near relations the infant has; (4) The rank and position in life of the infant and parents; (5) What the infant's property and fortune consist of; (6) The age, rank, and position in life of the person to whom the infant is about to be married; (7) What property, fortune, and income such person has; (8) The fitness of the proposed trustees, and their consent to act; and the proposals for the settlement of the property of the infant, and of the person to whom the infant is proposed to be married, must also be submitted to the Judge.

On an application under the Act, where the infant is not its ward, the Court is not bound to inquire into the propriety of the proposed marriage, but only into the propriety of the proposed settlement: although what would be a proper settlement in any particular case, must sometimes lead to an inquiry into all the circumstances of the proposed marriage.¹

When the proposals for the settlement have been approved, the draft of a deed to give effect thereto is prepared by the lady's solicitor, and settled at Chambers, with or without the assistance of the conveyancing counsel; and the engrossment is signed in the same manner as in the case of a ward of Court.

Where a draft of a settlement had been already prepared by one of the conveyancing counsel of the Court, it was directed to be settled in Chambers, without being referred to the conveyancing

¹ *Re Dalton*, 6 De G. M. & G. 201; 2 Jur. N. S. 1077; overruling 3 Sm. & G. 331; see, however, *Re Strong*, 2 Jur. N. S. 1241, L. C. & L.J.J.

counsel.¹ The Court, in the case of a female infant, sanctioned the introduction of a clause rendering it compulsory on the successive owners of the estate, or their husbands, to assume the name and arms of the ancestor from whom she derived the property, and limiting the estate over in case of default or refusal; but refused to sanction a clause that no person professing the Roman Catholic religion should take any interest under the settlement, and limiting the estate over in that event.²

When the engrossment has been signed, the Registrar prepares and issues the minute of an order approving the settlement, and directing that the infant be at liberty to execute it. The order is drawn up in the usual way.

¹ *Re Williams*, 8 W. R. 678, M. R.

² *Re Williams*, 6 Jur. N. S. 1064; 8 W. R. 678, M. R.

CHAPTER XXXII.

DIVORCE.

Alimony.—By the principle of the law of England the whole property of married persons is supposed to rest in the husband: where, therefore, the wife is under the necessity of living apart, the Court will decree a fitting proportion of her husband's income to be paid to her. This provision is called alimony, and is allowed during the pendency of a suit between them, as well to provide the wife with the means to obtain justice as for her ordinary subsistence.

The jurisdiction of the Court as to alimony was created by the Provincial Statute of Wm. IV., ch. 2, sec. 3., (the Act establishing the Court of Chancery having passed March 4, 1837), which declared that "the said Court of Chancery shall have the like power, authority, and jurisdiction in all cases of claim for alimony that is exercised and possessed by any ecclesiastical or other court in England." The first reported case for a claim for alimony in *Soules v. Soules*,¹ and it was there contended that the Court has no jurisdiction, but the reverse was decided.

The jurisdiction of the Court was again denied in 1852, in a case² in which the Chancellor (Blake) pointed out the powers conferred by the Statute on the Court of Chancery.

The difficulty mentioned by the Chancellor in this case was to some extent removed by the Provincial Statute 20 Vic., ch. 56, sec. 2, (1857), which provided that the Court of Chancery "shall also have jurisdiction to decree alimony to any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her by the law of England to a decree for

¹ *Soules v. Soules*, 2 Grant, 292.

² *Seavern v. Seavern*, 3 Grant, 451.

restitution of conjugal rights. Such alimony to continue during such separation and until the further order of the Court." And the power of the Court was further extended by 22 Vic., ch. 12, sec. 29, Consolidated Statute of Upper Canada, page 51, which enacts that the Court "shall also have jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when decreed shall continue until the further order of the Court."

The reader is referred to the general remarks made in 2 Blackstone's Commentaries, page 10, which will pave the way for a more minute statement of the law on this subject.

It will be observed that we have no Court in the Province empowered to decree either divorce or restitution of conjugal rights; that authority was, until the recent changes of the law in England, vested in the Ecclesiastical Courts; the only power given to the Court of Chancery is that to decree alimony, and then only in the following cases:—

- I. Where, by the English law, the wife would be entitled to alimony.
- II. Where she would, by that law, be entitled to a divorce and to alimony as incident thereto; and,
- III. Where her husband lives separate from her without sufficient cause, and under circumstances which, in England, would have entitled her to a decree for restitution of conjugal rights.

It will therefore be necessary to consider what the law of England on these points is, or rather what it was, for the establishment of a Court of Divorce has to a great extent altered the old law.

The following extracts are taken from Rogers' Ecclesiastical Law excepting where decisions in our own Court are interpolated; and

the practitioner will of course understand that much is said having no direct application to this country where the practice is very different from that in the Ecclesiastical Courts of England ; but the principles of the English cases govern us, and it is therefore necessary that they be understood.

Divorce.—The *Canon* law does not admit an absolute dissolution the marriage contract for any cause whatever ; which principle of is still adhered to by the ecclesiastical law of this country. A sentence of divorce in substance, declares that “ the said A. B. ought to be divorced from bed, board, and mutual cohabitation with the said C. D., her husband, until they shall be reconciled to each other ;” and proceeds to caution each party from contracting marriage in the lifetime of the other.¹ It is true, that if an individual be able to incur the expense of obtaining an act of parliament, he may procure a suspension of the law in his own particular case, by the interference of the legislature to dissolve his marriage ; but the law cannot do it *proprio vigore*, it is only by the intervention of a power above the law, that the *vinculum* can be dissolved ; when, therefore, the term “ Divorce ” is used, nothing more is intended by the laws of England than a separation “ *a mensa et thoro*.”²

A sentence of divorce is the judgment of the spiritual court, separating two persons *legally* married. Lord Coke says, “ *de facto* married.”³ But, with submission to so high an authority, proof of the *factum* of marriage is not sufficient. Proof of a *valid* marriage is the very first step, and is altogether indispensable.⁴ A marriage *de facto* includes all descriptions of marriage, as well those that are void as those that are voidable ; but in a suit for divorce, a defendant may plead either that the marriage was absolutely void by reason of some civil disability in one of the contracting parties,⁵ or that it was voidable by reason of some canonical impedient, as for example, that it was incestuous, or that one of the parties was incapable of contracting marriage by reasons of impotency.⁶ “ The validity of the marriage is not a mere incidental point, it is the

¹ *Conest.* 279 ; *Oughton*, tit. 215.

² *Cro. Ell.* 908 ; *Cro. Car.* 463 ; *Noy*, 108 ; 3 *Inst.* 89 ; *Co. Litt.* 355.

³ It will be understood that these and the following remarks under this heading are made without reference to the comparatively late introduction into England of Divorce Courts.

⁴ 2 *Hagg.* 8 ; *Aylife Parer.* 60.

⁵ 2 *Phul.* 11.

⁶ *Guest v. Guest*, 1 *Hagg. Con.* 322.

foundation of the whole proceedings. There can be no adultery if there is no marriage. The first point to be proved is the marriage, which the other party may contest; and if not contested, the form of the sentence in such cases pronounces, that there has been a true and lawful marriage, as well as a violation of it."¹ So, it has been held, that a plea of a prior marriage is a good ground to stay proceedings, and that the question of the former marriage must be determined before the question of adultery is gone into.² So, where nullity of marriage is pleaded.³

Assuming therefore, that in all suits for divorce, it is necessary to prove a valid marriage: it follows that no cause or impediment existing previous to marriage can be made the subject matter of a suit for divorce; the civil and canonical disabilities which render the marriage contract either void or voidable, are grounds for a proceeding for nullity of marriage, but not for divorce.⁴

The only grounds upon which a divorce can by the law of England be granted, are generally two; viz., 1st, Adultery; 2dly, Cruelty; to which a third may be added, in which the ecclesiastical court has interfered, for the relief of a wife whose husband has been guilty of unnatural practices.

Adultery, which is said by Isydore, in his Book of Etymologies, to be compounded of the words, "*ad alterius thorum*," means an actual surrender of the person; and although the rule of the ecclesiastical court does not require direct evidence of the very fact committed at a specified time and place,⁵ yet it must be satisfied that the fact of adultery has actually been committed.⁶

Adultery being an act of darkness, and of great secrecy, can hardly be proved by any direct means; therefore in relation to the proof by reason of such difficulty, it happens that presumptive evidence alone is sufficient proof; and this presumptive proof is collected and inferred *ex actibus propinquis*, that is to say, from the proximity and nearness of the acts; and thus adultery may be

¹ Per Lord Stowell, 1 Hag. Con. 322.

² *Robins v. Wolseley*, 2 Lee, 149.

³ 2 Phill. 11.

⁴ Godol. Ab. 500.

⁵ 4 Hagg. 262.

⁶ 2 Hagg. Con. 226, 355; 2 Hagg. 14; 3 Hagg. 74; 1 Hagg. Con. 299.

proved by such conjectures as are received and approved of either by law or nature.¹

In *Williams v. Williams*,² Lord Stowell says, "Direct evidence of the fact of adultery is not required, as it would render relief almost impracticable; but there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency satisfy the legal conviction of the court that the criminal act has been committed. The court will look with great satisfaction to the authority of established precedents; but where these fail, it must find its own way, as well as it can, by its own reasoning on the particular circumstances of the case." Again, in *Loveden v. Loveden*,³ "The facts are not of a technical nature, but are determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings. Upon such subjects, the rational and the legal interpretation must be the same."

What are the circumstances which lead generally to the conclusion that the fact of adultery has taken place, can hardly be laid down upon any rule, because they may be infinitely diversified by the situation and character of the parties; by the state of general manners; and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule seems to be, that the circumstances must be such, as would lead the guarded discretion of a reasonable and just man to the conclusion.⁴

Facts need not be so specially proved as to produce the conclusion that the fact of adultery was committed at a particular hour, or in a particular room.⁵ Statements of general, loose, and duly familiar conduct are sufficient to establish a high and undue degree of familiarity between parties. Isolated facts may lead to a conclusion of crime: for the proper way to consider this sort of evidence is not to take them separately, but in conjunction; they mutually interpret

¹ *Wife Parer*. 50.

² 2 *Hagg. Con.* 2, 3.

³ 2 *Hagg. Con.* 2, 3: *ib.* 227; 1 *Hag. Con.* 375.

⁵ 2 *Hagg. Con.* 4.

² 1 *Hagg. Con.* 299.

each other; their constant repetition gives them a determinate character; and such habits, when continued in public, lead to the inference that the parties would go greater lengths if opportunities of privacy occurred.¹ If a witness stops short, and declines or omits to state his belief of the ultimate consummation of the act, it is true that the court is put on its guard to see whether there is any ground for a scepticism of this nature; but it would be a monstrous proposition to assert, that the merits of a case of this nature is not to depend upon the narrative, but on the logic of the witness. The court, representing the law, draws that inference which the proximate act unavoidably leads to: the scepticism of the witness, if it really exists, signifies nothing.²

Where there has been general cohabitation, the necessity of proving particular facts is excluded,³ and the *cases* collected in the *notes*. If adultery continued a long time, with pregnancy, and birth of a child during her husband's absence be pleaded, it is useless to prove more than the birth of the child, identity, and non-access of the husband.⁴

A woman going to a brothel with a man furnishes conclusive evidence of adultery against her, for it would be impossible for her to go to such a place but for a criminal purpose.⁵ So as against a husband, proved to have gone to such a place, a violent suspicion is raised, only to be rebutted, if a suspicion so founded can be rebutted, by the very best evidence.⁶ But if it be shown further that he was alone a considerable time with a common prostitute, it would be of itself sufficient evidence of adultery.⁷ But the same conclusive presumption does not attach to the circumstance of a married woman going to a single man's house or lodging, unconnected with other facts, however improper such conduct may be;⁸ for the court must be convinced in its legal judgment that the woman has transgressed, not only the bonds of delicacy, but of duty;⁹ but when the windows were proved to be shut at such visits, and letters which could not be otherwise explained were proved, the court has inferred that adultery took place at such visits.¹⁰ In one case, separation, by

1 2 Hagg. Con. 228.

4 1 Hagg. 8.

6 1 Hagg. 720.

8 1 Hagg. Con. 302.

10 1 Hagg. Con. 302.

2 2 Hagg. Con. 278.

5 1 Hagg. Con. 302, 303; 2 Hagg. Con. 24; 4 Hagg. 132.

7 1 Hagg. 720.

9 1 Hagg. Con. 302.

3 2 Hagg. Con. 4.

reason of adultery and *cruelty*, was pronounced, on proof of undue familiarities, clandestine communication with frequent opportunities of guilt, and concealed correspondence by letters, denoting great ardour of passion, if not allusions to actual guilt, (but no credible proof of a fact of adultery) united with great violence of conduct and language, and an attempted blow.¹

The communication of the venereal disease long after marriage is *prima facie* evidence of adultery.² So where the wife, separated from her husband, lived with a young officer for months at different places under the disguise of separate beds.³ So where the parties lived together in seclusion, the man sleeping apart at an inn ;⁴ for, as the court in another case observed ; “ parties, living for months and even years together, and hoping to insult the feelings of the husband and elude the justice of the tribunals, have by such contrivances supposed that they were sufficiently protected ; but courts have ever held that these evasions were perfectly insufficient for such a purpose, and the parties have been concluded by general cohabitation.”⁵

Ante-nuptial incontinence cannot lay the foundation of a suit for divorce by reason of adultery.⁶ It may possibly be a defence in a suit for restitution of conjugal rights ;⁷ or, if a wife were to set up a plea of malicious desertion, it would seem that it might be pleaded, that the discovery of her misconduct before marriage, induced her husband to quit her society.

Confession generally ranks high, or perhaps highest in the scale of evidence ; for what is taken *pro confesso* is taken for indubitable truth, as the plea of “ guilty,” by the party accused, shuts out all further inquiry. Yet it is a species of evidence which, especially in cases of adultery, is to be regarded with great distrust. *Oughton* has devoted a title to this subject, *Tit*, 213, which, however, seems copied from *Consent*, 279, 280 ; in which he urges the danger of receiving any such confessions from the temptations to collusion, or that the husband may prevail on the wife by threats or intrea-

1 3 *Hagg.* 618.

3 1 *Hagg.* Con. 445 ; 2 *Hag. Con.* 6, n.

5 2 *Hagg.* Con. 6.

6 1 *Add.* 1 ; 2 *Phil.* 127 ; *see* *vid.* 2 *Ad.* 306, note (a.)

7 1 *Hagg.* Con 373.

2 1 *Hagg.* 767.

4 *Id.*

ties to admit a crime of which he is not guilty. He adds also another caution with regard to identity, "*ne persona supposititia (quod meis diebus bis novi) coram eo, ad adulterium libellatum confitendum producat.*" Clarke also speaks of two such instances, probably the same as spoken of by Oughton. Lord Stowell, in *Searle v. Price*,¹ says, "In cases of adultery no confession of the fact can be admitted alone, it being particularly necessary to guard against the imposition of making false acknowledgements to procure a separation. A married person may afterwards wish the marriage avoided. For this purpose a false case might be established before the court, or a former marriage might be propounded by one party and admitted by the other. The utmost vigilance is, therefore, required that the truth should be established, independent of the confessions of the parties. They might go further. By substituting false parties, who might admit themselves to be parties in the cause when they were not, might destroy the right of real parties. Even a decree of confrontation would not protect the court in such a case, for the real parties might be unknown to the court, its officers, and to the practisers in the court."

Upon confession of the wife alone the court will not build a sentence of separation, it being enjoined by the 105th Canon that no sentence of divorce should be given upon the sole confession of the parties.² And, although it seems to be the more rational doctrine to say, that such a confession by a wife, proved to the satisfaction of the court to be perfectly free, might be sufficient to found a prayer for a mere separation *a mensa et thoro*, though not *pro dirimendo matrimonii vinculo*, yet the decisions establishing a different construction are too literal to be shaken.³ But, where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged *particeps criminis* being communicated to her, are admissible on behalf of the husband.⁴ For though such evidence is looked at with distrust, it is not inadmissible;⁵ and when free from all taint of collusion, ranks of the highest importance.⁶

¹ 2 Hagg. Con. 189.

² 2 Phil. 166; 2 Hagg. Con. 189, 316; 3 Hagg. 77, 131; 4 Hagg. 292.

³ *Mortimer v. Mortimer*, 2 Hagg. Con. 316.

⁴ *Burgess v. Burgess*, 2 Hagg. Con. 235; 2 Hagg. 407.

⁵ 1 Hagg. Con. 204.

⁶ 2 Hagg. 409; 4 Hagg. 292.

The declaration of the paramour, in the wife's absence, that she had committed adultery previous to that charged in the libel is not admissible; but a declaration in her presence, and confirmed by her, is; nor can the court reject it on the ground that it reflects on third parties, or that it does not refer to the adultery charged in the suit.¹

The declaration of a *particeps criminis* is by itself, however, but weak evidence; but where criminal intention is fully proved, and nothing but the consent of the other party is wanting, the consent of such a person is stringent evidence that the act attempted has taken place.²

Letters from a wife to her paramour, leaving no doubt of gross familiarity and indulgence, and of proposals for future intrigue, may be admitted in proof of adultery.³

But letters of the paramour, where there are no strong facts proved, from which adultery can be inferred, found in the wife's possession, not necessarily implying the commission of adultery, will not support a sentence of separation by reason of adultery.⁴

Where a letter is pleaded to be in possession of the adverse party, the contents may be set forth at length, leaving the other party, if she pleases, to produce the letter.⁵

Where criminal connection is once shown, its continuance is presumed, especially where the parties live under the same roof.⁶

In all cases of adultery the identity of the parties is a very necessary ingredient in the proof. Therefore the mere acknowledgment to the officer serving the citation, or the appearance of the party in the cause, have been considered insufficient; and identity has been required to be proved by extrinsic evidence.⁷

The libel must plead the conclusion of adultery; because, unless it is pleaded, *non constat* that it may not be a suit for mere solicitation of chastity; but, if the party does aver it, though he proves

1 *Croft v. Croft*, 3 Hagg. 318; Hagg. Con. 148, 376.

2 1 Hagg. Con. 376.

3 2 Hagg. Con. 21, 23; 4 Hagg. 262.

4 2 Hagg. 8.

5 3 Hagg. 327.

6 3 Hagg. 260.

7 1 Hagg. 305; 2 Hagg. Con. 180.

only proximate acts, yet he unquestionably proves the whole of his averment in the libel ; and, if the facts are of such a nature as will justifiably and almost necessarily lead to the conclusion, the court, representing the law, draws the inference.¹ Where the husband's adultery is to be proved by pregnancy and acknowledgment of children, specific acts need not be pleaded ;² nor, where the charge is keeping houses to which he took loose women.³ When parties are living separate, the commencement of the acquaintance with the alleged paramour, and of the suspicions of the person under whose care the wife was, should be set forth circumstantially.⁴ Though the court will not, on presumption, and in the absence of matter strongly inculpatory, impute connivance to a husband, it will not debar him from pleading circumstances which make the story consistent and natural ; for a party ought not to be forced to depend for explanation of his conduct, on the ingenuity of counsel, or the discrimination of the court.⁵

The introduction of verdicts in the pleadings was long resisted in the ecclesiastical courts, and it is now understood that they are merely introduced as circumstances of evidence ; it is difficult to comprehend in what view an action against another party can in any way instruct the conscience of the court upon an issue between the husband and the wife ; she not having been party or privy, in the remotest degree, to that litigation.⁶

The only object indeed of the introduction of verdicts of courts of law into the proceedings seems to be, to satisfy the court that the husband has honestly endeavoured to obtain all the redress the law will afford him.⁷ If ever such a verdict can weigh at all, it must be as a test of the credit of the witnesses, if the same witnesses are examined in both courts.⁸

In considering the admissibility of pleas, the court must be cautious not to exclude matter essential to a due decision, nor allow proceedings to extend to an unnecessary length ; but if a serious doubt arise as to the ultimate effect of any averment it ought to be admitted.⁹

1 1 Hagg. Con. 278.

4 3 Hagg. 315.

6 2 Hagg. Con. 236 ; 2 Hagg. Con. 51 ; 3 Hagg. 364.

7 2 Hagg. Con. 303.

2 1 Hagg. 746 ; ib. 6.

5 3 Hagg. 312 ; 1 Hagg. 6 ;

3 Hagg. 364.

8 3 Phil. 99.

3 ib. 777.

sed vid. 3 Hagg. 123.

9 3 Hagg. 310, 311.

A libel pleading specific acts of adultery can only be rejected on two grounds:—1. That the plea on the face of it shows a case impossible of proof. 2. That it appears from the facts pleaded that the party complaining has barred himself.¹

The whole substantive case should be at once brought before the court;² but where it is clearly shown that the facts could not have been sooner pleaded, additional articles may be given in,³ and a sentence may be obtained on facts not existing at the commencement of the suit; for a party is not limited to the contents of his libel.⁴ But the libel must contain all the facts that by diligence can be ascertained at the time; and subsequently, such new facts only can be pleaded as are nearly conclusive of guilt.⁵ Pleading after publication generally is within the discretion of the court;⁶ for in cases of adultery, as in other cases, publication is a bar to further pleading, as of right.⁷

Where the evidence did not in the first instance amount to judicial proof, but the conduct proved had been so suspicious as to raise a strong presumption of adultery, and that an adulterous intercourse was actually carrying on between the parties accused; the court will, on affidavits, rescind the conclusion of the cause, and allow the husband to give in an additional allegation, upon which a sentence of separation may be eventually founded.⁸

But where there was a suggestion, that a charge of collusion and connivance, raised in argument on the evidence produced by the husband, was a surprise upon him, the court refused to rescind the conclusion of the cause, in order that some letters might be pleaded; being of opinion that the husband was bound so to have shaped his case in the first instance as to have guarded himself from such suggestions; but in this case there was no distinct plea of connivance, nor had the cross-examination been directed to that point.⁹ In another case it was observed, that the husband must prove his case, so that his own evidence shall not create a bar by reason of connivance or recrimination, for of such evidence the wife is entitled to the full benefit,¹⁰ but, it must always

1 1 *Hagg.* 765.

4 2 *Hagg.* 136.

6 3 *Hagg.* 344.

8 3 *Hagg.* 1; 2 *Hagg.* 144, Supp.

2 3 *Hagg.* 742.

5 3 *Hagg.* 738; 4 *Hagg.* 235.

7 2 *Hagg.* Supp. 137.

9 3 *Hagg.* 133.

3 3 *Hagg.* 97; 1 *Hag.* 249.

10 3 *Hagg.* 77.

have less weight that it would have, if a defensive recriminatory plea had been pleaded.¹ In *Turton v. Turton*, 344, Dr. Lushington said, "I am not aware of any case in which, upon answers to interrogatories, the court has decided, either that recrimination or connivance has been proved, so as to dismiss the suit of the wife ; and on principle, I think it would be difficult to arrive at such a decision."² After publication of the evidence in a suit of divorce for the adultery of the husband, the court will not in the first instance delay the hearing, nor will it rescind the conclusion of the cause, in order to admit an allegation counterpleading certain answers to letters of the wife, which had been annexed to the interrogatories on cross-examination, suggesting condonation and connivance on the part of the wife ; and which answers were explanatory of the letters, and were intended to repel the suggestions raised on the part of the husband. The court saying, "It is necessary for me first to ascertain what use is made of these documents and answers to the interrogatories, by the husband's counsel ; if they are insisted on as a bar to the separation prayed by the wife, and I should consider them important, I will allow the admissibility of the plea now tendered to be debated, but otherwise its contents will be immaterial." The court also refused to have the letters annexed to the interrogatories dis-annexed.³

When adultery has been proved to the satisfaction of the court, the complainant is entitled to a remedy by divorce ; but this remedy may be barred by his own conduct. There are three general grounds usually pleaded in answer to a charge of adultery.⁴

1st. *Compensatio Criminis*, a set-off of equal guilt or recrimination, of which Conset, 280, says, "If the defendant doth prove that the plaintiff hath also committed adultery, the defendant is to be absolved as to the matters requested in the libel of the plaintiff."⁵ It is now admissible in France,⁶ and the state of New York ;⁷ but not in Scotland. Formerly, however, it was not admissible in France, upon the principle, as it seems, that adultery committed by the husband was not a ground of divorce or separation on the part of the wife.⁸

1 1 Hagg. 747.

2 Vid. 2 Phill. 153.

3 3 Hagg. 346.

4 *Creuze v. Creuze*, 3 Hagg. 129.

5 *Oughton*, tit. 214.

6 Cod. Civ. Art. 23.

7 *Kent's Comm.* 100.

8 *Pothier* 3, v. 117 ; 1 Hagg. Con. 150.

2dly. Condonation. If there has been a reconciliation, between a man and his wife, after adultery is known to have been committed by her, it is not lawful for him to have his action for divorce against her; for a divorce is not commanded, but only permitted to the innocent person, who may recede from his right, and renounce a favour introduced on his behalf.¹ Oughton, speaking of the modes in which the knowledge of the adultery is to be derived, mentions three. 1. The wife's confession. 2. Communication of the witnesses whom he afterwards produces on the trial. 3. That he himself detected her in the fact.² *Probabilis scientia*, he adds, bars a divorce; that is condonation after *probabilis scientia*.

3dly. Connivance. *Ayliffe*, Parer. 226, speaks of the case of a husband prostituting his own wife, as one wherein a divorce cannot be had by reason of that adultery; but the law of this country does not require it to be shown that he has been the active agent of his own dishonour. Indifference and neglect, fairly imputable to a corrupt intention, are sufficient.

Recrimination, or a set-off of equal guilt, is founded on the principle of the Roman law; which withholds from a guilty husband the remedy of a divorce against a guilty wife. This principle appears a good, moral, and social doctrine.³ The party cited is entitled to be dismissed as respects the particular complaint charged in the libel, though that charge be proved, as if no offence had been committed or proved.

It appears, from *Gilbert's Jus Canonicum*, that recrimination was formerly not admitted in the courts of France; but in this country it was recognized by all the delegates in the case of *Lord and Lady Leicester*, in 1787, and has been received here as a sufficient plea in bar to a suit for divorce by reason of adultery, ever since. "*Ea Lege quam ambo contemperunt neuter vindicetur, paria enim delicta mutua pensatione dissolvuntur*," is said to be the maxim of the civil law, upon which the plea is founded.⁴

A single act of adultery committed by either party (husband or wife) at any time before sentence, will bar a sentence of separation

1 *Ayliffe*, Parer. 48, 226.
4 2 *Hagg.* 292.

2 Tit. 214.

3 1 *Hagg.* Com. 147

at the suit of the other party,¹ or will compel the court to dismiss both parties, adultery being mutually, or reciprocally, charged in the cause.² And the courts must allow either of such parties to plead adultery against the other in any stage of the cause, whether before or after publication, and how long soever this may have passed, or the cause may have been depending; it being pleaded within a reasonable time after coming to the proponent's knowledge.³

Nor does it seem to make any difference, that the act of incontinence did not take place till after the discovery of the wife's infidelity, and the voluntary separation which ensued thereupon; and although there was no reason to believe but that the husband had conducted himself with propriety, up to that time.⁴

Where neither party has an interest in the suit, that is, when the proceedings are *ad publicam vindictam*, and not for a divorce, recrimination is no plea: for there, the public, and not the prosecutor, is the injured party, and it can be no excuse for the breach of the good order of society by the one party, that the other has been guilty of the like also.⁵

The doctrine, that this, if proved is a valid plea in bar, has its foundation in reason and propriety; it would be hard if a man could complain of a breach of contract, which he himself has violated.⁶

As it is no answer to a charge of adultery, that the parties were living separate at the time the adultery was committed, neither does it impeach the validity of a recriminating allegation that the adultery there charged, was committed during a voluntary separation.⁷

If once the guilt of the husband, the party complained of, be established, the *onus probandi* shifts, and if he seeks to deprive his wife of her remedy, by imputing to her criminality of any kind, he

1 1 Hagg. 722; 1 Hagg. Con. 147, 152.

3 2 Add. 250.

5 1 Hagg. Con. 148.

7 2 Hagg. Con. 296; 1 Hagg. 789; 1 Hagg. Con. 142, in note.

2 2 Hagg. 376; 1 Hagg. 714; 1 Add. 411.

4 2 Hagg. Con. 295.

6 1 Hagg. 790.

must make good that charge by evidence, which admits of no dispute.¹

Where adultery is pleaded by way of recrimination, and as a bar, it is not necessary to prove such strong facts as are required to convict the other party in the principal suit; for to obtain a divorce a man must have a pure character.² But the evidence in such a case ought to be from very credible witnesses.³

Nor will the condonation of a wife bar her of her right to recriminate, for then she seeks only to be dismissed; when condonation is pleaded as a counter plea to *compensatio* pleaded in bar, it is insufficient, for it is not a rule that whatever is a plea in bar, and disables a party from bringing the suit, likewise destroys the defence.⁴

The general conduct of a husband, has been considered sufficient to support a recriminating plea in bar, though it would not have been sufficient to support an original and substantive charge of adultery; for it is a general principle, that many things are good for one purpose, though not for another.⁵ Thus, where a husband failed in his endeavours with several females, but from no want of purpose or activity on his own part, but from an honest and powerful resistance on the other, it may fairly be concluded, that where no such resistance was to be apprehended, the criminal act would have taken place.⁶ So, if the criminal intention of the husband be satisfactorily proved, and it be also proved that the conduct of a particular female, whose chastity he had before solicited, was different on former occasions when she had resisted him; and, moreover, if after being discovered in an improper situation with this man, she ceases to complain, her silence and submission afford the strongest presumption that his attempt has been more successful.⁷

It must, however, be remembered, that although a plea of recrimination in bar of adultery may be sustained on slighter circumstances than would be required to sustain an original charge of adultery, still the facts and circumstances alleged in such plea, must be of

1 3 Hagg. 350.

2 2 Lee, 384.

3 1 Hagg. Con. 152.

4 1 Hagg. Con. 373.

2 1 Hagg. Con. 295; 1 Hagg. 721.

4 1 Hagg. 797.

6 Ib.

such a nature, as to lead to the conclusion that adultery by the party against whom the recrimination is pleaded, has actually taken place. In *Chettle v. Chettle*,¹ Sir J. Nicholl said, "I have not heard a case stated, in which, there being proof of adultery by the wife, the mere solicitation on the part of the husband has been considered a bar. But solicitation of chastity will revive condoned adultery."²

A recriminating allegation, pleaded as a defence to adultery, may, if the original charge be not proved, operate as a substantive case upon which a divorce may be founded.

In a case where a wife brought a suit for separation, by reason of adultery, the husband denied his own guilt, and gave in a recriminatory charge; both parties prayed a separation. The sentence of the consistory court was, that the wife had failed to support her libel, but that the husband had proved his recriminatory allegation; and accordingly decreed a separation.³ Confirmed on appeal.⁴

So, where the wife libelled the husband for cruelty and adultery, the husband answered by a recriminatory charge of adultery against the wife; the court held the cruelty and adultery of the husband not proved, but that the adultery of the wife was proved; and pronounced for a divorce.⁵

The wife having failed in a charge of adultery, and a recriminatory plea on the husband's part being proved; cruelty, and the introduction of his wife to a female of loose character, the wife's guilt not being connected with such introduction, will not bar his prayer for a divorce.⁶

Cruelty cannot be pleaded in recrimination to a charge of adultery, and as a bar to a divorce for such adultery.⁷ Nothing, indeed, except adultery can be pleaded in bar by way of recrimination to a charge of adultery. The *delictum* must be the same.

¹ 3 Phill. 508.

³ *Harris v. Harris*, 2 Hag. 376.

⁵ *Kenrick v. Kenrick*, 4 Hag. 123.

⁶ 2 Hag. 376.

⁷ 1 Hag. Con. 451.

² 1 Hag. 762.

⁴ *Ib.* 511.

Neither are indifference, ill behaviour, or cruelty pleadable in a suit for adultery. They will not justify a wife's criminal conduct.¹ In the case of *Harris v. Harris*,² the Court said, "The citation states the suit to have been brought by the wife for adultery alone. The charge of cruelty, therefore, was not pleaded in the libel, nor could it have been pleaded responsively to the allegation admitted on behalf of the husband charging Mrs. H. with adultery; for there is no point, as it appears to me, more settled than that cruelty cannot be pleaded in bar of a charge of adultery." At an earlier period this question seems not to have been considered as settled. In *Chambers v. Chambers*,³ the Court said, "On this plea a question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery proved against her, by the plea of cruelty. I am inclined to think she would not. A wife has a right to say, 'You shall not have a sentence against me for adultery, if you are guilty of the same offence yourself.' The received doctrine of compensation would have that effect, because both parties are in *eodem delicto*; but this is not so in recrimination of cruelty: the *delictum* is not of the same kind. Here the husband is the '*prior petens*' in a suit of adultery; and I take the general doctrine to be, 'that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage-bed.'"

Condonation is forgiveness of former adultery, legally releasing the injury;⁴ but, to make it operate as a bar to a suit for adultery, there must be a complete knowledge of the adulterous connexion, and a condonation subsequent to such knowledge.⁵

Condonation may be either express or implied; expressed either in words or in writing, or implied from general conduct. It may be implied by the husband cohabiting with a delinquent wife; for it is to be presumed he would not take her to his bed again unless he had forgiven her.⁶

But the effect of cohabitation is justly held less stringent in the case of a wife. She is more *sub potestate*, more *inops consilii*. She

¹ 2 *Hagg.* 92.

³ 1 *Hagg.* Con. 461.

⁵ 1 *Hagg.* 733; 3 *Hagg.* 351, 602; 3 *Hagg.* 113.

² 2 *Hagg.* 411.

⁴ 1 *Hagg.* 793; 2 *Phill.* 411.

⁶ 1 *Hagg.* 793; 3 *Hagg.* 83.

may entertain more hopes of the recovery and reform of her husband. It would be hard if condonation by implication were held a strict bar against a wife. It is not improper that she may for a time show a patient forbearance. She may find difficulty either in quitting her husband's house or withdrawing from his bed. The husband, on the contrary, cannot be compelled to the bed of his wife. A woman may submit to necessity.¹

In order to found condonation where the parties have separate beds, there must be something of matrimonial intercourse proved. It cannot rest on the negative fact of the wife not withdrawing herself;² but it seems that a husband, by pleading that the wife slept at his house the night after the last act of adultery charged in the libel, of which adultery he was informed, takes on himself the *onus* of showing, that they did *not* sleep together on that night; though generally a party, relying on condonation, must plead it.³

The question, What amounts to condonation? must necessarily depend upon the circumstances of each particular case, always bearing in mind the above principle, that the presumption of condonation in the case of a wife is never so strong as in the case of a husband. If she overlooks one act of human infirmity, it is not a legal consequence that she has pardoned all other acts, and tolerates every species of debauchery. A woman has not the same control over her husband, not the same guard over his honour, nor the same means to enforce his observance of the marriage vow.⁴ Therefore it has been held that mere lapse of time in the case of a wife is no condonation;⁵ for forbearance on her part does not weaken her title to relief;⁶ but neglect on the part of the husband to institute proceedings, betraying apathy to the injury of which he eventually complains not satisfactorily accounted for,⁷ or a continuance to cohabit after circumstances of suspicion have been brought to his knowledge;⁸ are sufficient to bar his remedy. So, also, in the case of a wife; very long acquiescence after knowledge, amounting to a license, would frustrate her remedy;⁹ in the case of a husband great

1 1 *Hagg.* 793, 794.

3 3 *Hagg.* 84.

5 1 *Hagg.* 766.

7 *Dobbyn v. Dobbyn*, Poynter, 233 2 *Hagg. Con.* 279, 319; 3 *Hagg.* 132, 348; 2 *Phill.* 161.

8 1 *Ad.* 443; 3 *Hagg.* 86.

2 1 *Hagg.* 794.

4 1 *Hagg. Con.* 133; 1 *Hagg.* 793.

6 1 *Hagg.* 766; 2 *Hagg. Con.* 279; 3 *Hagg.* 355.

9 2 *Phill.* 153; 1 *Hagg.* 740.

facility of condonation leads to an inference that he does not duly estimate the injury, and will induce the Court to look at his subsequent conduct with jealousy.¹ The condonation of adultery by a husband, still more, repeated reconciliations after repeated adulteries, create a bar of greater effect, than the condonation of a wife of repeated acts of cruelty.²

All condonations, however, are considered to be, expressly or impliedly, upon condition that the injury shall not be repeated. Condonation is not an absolute and unconditional forgiveness.³ It is a promise on the implied condition that the injury shall not be repeated, and that the party condoning shall be treated with conjugal kindness. On breach of which condition, the right to a remedy for former injuries immediately revives.⁴ If the offence forgiven is afterwards renewed, the party has a right to revert to former facts, if she bring them in conjunction with the latter.⁵

Where the plaintiff in an alimony suit, after an order for interim alimony, had been made returned to her husband's house, and resided there for some time, but was afterwards obliged to leave by reason of cruelty, a motion to set aside the interim order on the ground of condonation was refused with costs.⁶

The effect of condonation, therefore, is entirely got rid of, and a former charge revived, by a repetition of the injury complained of;⁷ nor is it necessary that clear proof of actual adultery should be given to get rid of condonation of previous adultery. If it were, the revival would be useless, for the subsequent act would be sufficient to sustain the suit.⁸ Therefore solicitation of chastity by a husband though no bar to a suit against him by a wife for adultery,⁹ would nevertheless be sufficient to revive a previous adultery after an intermediate condonation;¹⁰ it has been contended that, admitting these propositions, yet that the second and reviving injury must be *ejusdem generis* with the injury revived; but this is not the rule, it being now clearly established that

1 3 Hagg. 78 ; 2 Phill. 411.

3 1 Hagg. 782 ; 1 Hagg. Con 130 ; 1 Hagg. 761.

5 Maxwell v. Maxwell, 1 Chm. Rep. 27.

7 1 Hagg. 761.

9 3 Phill. 508.

2 2 Hagg. 113.

4 1 Hagg. 761, 762 ; 781, 786.

6 Maxwell v. Maxwell 1 Cham R. 27.

8 1 Hagg. 761 ; 2 Phill. 167 ; 3 Hagg. 685.

10 Hagg. 762.

cruelty will revive adultery.¹ So also the attempts of a husband, when affected with venereal disease, to force his wife to his bed not only amounts to cruelty, but to evidence of adultery, sufficient to remove condonation of either.²

Circumstances may take away the effect of a condonation which would not support an original cause ;³ for it does not follow that, because condonation will bar the remedy of a party agent, it will destroy the defence of a party recriminating.⁴

A conditional promise made by a wife under force and violence, the condition never being performed, is no condonation.⁵ Nor, her unwilling return to live in the same house, if unaccompanied by connubial cohabitation.⁶ So, also, if the wife withdraws from the husband's bed, though not from his house, the continuing in the house cannot be set up as condonation ;⁷ especially, if on execution of articles of separation, a wife allowed a husband to have a bed in *her* house, at the entreaty of *his* friends that he should be merely under the roof by sufferance.⁸

Condonation may be implied from delay, in instituting legal proceedings, not satisfactorily accounted for. Delay under such an injury, founds a presumption of passive, or even criminal acquiescence. In the case of *Best v. Best*,⁹ an affidavit of the husband was allowed to be read to explain and account for the delay of five years ; upon which, adultery having been proved, a divorce was granted ; but where a wife did not account for her delay, the suit was dismissed.¹⁰

It seems, that a lunatic, having recovered, may condone adultery, and resume cohabitation after a divorce *a mensa et thoro*, instituted by his committee.¹¹

Condonation ought, in strictness, to be pleaded, that there may be an opportunity of contradiction.¹² But if it appear clearly upon the depositions, that there had been cohabitation subsequent to

1 1 *Hagg.* 738 ; 3 *Hag.* 635.
 3 1 *Hagg.* 782, 789.
 5 6 1 *Hagg.* 767.
 7 *Hagg.* 782, 789, 764 ; 2 *Hagg.* 118.
 9 2 *Phil.* 161.
 11 2 *Phil.* 160.

2 1 *Hagg.* 767.
 4 1 *Hagg.* 797.
 6 1 *Hagg.* 782, 789.
 8 2 *Hagg.* 118.
 10 2 *Phil.* 155 ; sed. vid. 1 *Hagg.* 134.
 12 1 *Hagg.* Con. 292.

the detection of the wife and knowledge of the husband, the Court might call on the husband *ex officio* to notice it.¹ Therefore where it appeared that the wife slept at the husband's house after his knowledge of her adultery, he takes upon himself to reconcile that fact by showing that they did not sleep together; although generally, the party relying on condonation as a bar should plead and prove it;² but it seems, unless pleaded, it cannot operate as a bar.³

Condonation and connivance⁴ are especially different in their nature, though they have the same legal consequence of barring a party of his remedy. Condonation may be meritorious; connivance necessarily involves criminality.⁵

Connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place, upon the principle that *volenti non fit injuria*.⁶

In order to constitute connivance, it is not necessary that the husband should actively contribute to his wife's dishonour: the expression of *Sanchez*, on this head, "*Vir qui uxorem prostituit*;"⁷ seems too strong; passive acquiescence is sufficient, provided it be accompanied with an intention and expectation of leading the wife to guilt; but mere inattention, over confidence, dulness of apprehension, or indifference, are not sufficient to constitute connivance: there must be wilful concurrence.⁸ It is not mere imprudence and error of judgment that the law deems connivance. Conduct to bar, must be directed by corrupt intention.⁹ A plea of connivance must be from its nature circumstantial, and consist of many facts; trifling, perhaps, when taken separately, but taken altogether, sufficient to satisfy the Court; a husband framing a scheme to betray his wife, will hardly disclose it by any one broad unequivocal

1 1 *Hagg. Con.* 292.

2 3 *Hagg.* 84.

3 1 *Hagg.* 751; see *vid.* 1 *Hagg.* 795.

4 It is to be observed also that connivance must always precede, or be contemporaneous with, the act of adultery. Condonation must always be subsequent.

5 3 *Hag.* 86, 364.

6 1 *Hag. Con.* 146; 3 *Hag.* 58, 121; As to the modification of this principle as regards the wife's conduct, *vid.* 2 *Hagg. Con.* 279; 3 *Hagg.* 348, 352; 2 *Hag. Con.* 271; 3 *Hag.* 356.

7 *Sanchez de Matrimonio*, Lib. 10, Disp. 5, Nos. 3, 4.

8 3 *Hag.* 59, 76, 105, 123.

9 Per Lord Stowell, in *Hoar v. Hoar*, 3 *Hag.* 140.

act.¹ Nor is it necessary to prove connivance to *actual adultery* any more than it is necessary to prove an actual and specific act of adultery. If a system of connivance at improper familiarity, almost amounting to proximate acts, be established, a corrupt intention will be inferred, and more direct proof rendered unnecessary;² a husband is not barred by permission of opportunity for adultery; but, if he continues the meeting to obtain sufficient evidence of the fact, it is legal prostitution.³

The notoriously debauched character of the paramour; his exclusion from all respectable female society; the introduction of him by the husband to his wife; the encouragement of their intimacy; the allowing her to accept a sum of money from him; expostulations from her family at such intimacy; the refusal of the husband to attend to them; and improper liberties and familiarities in his presence, and without his remonstrance, are material facts to show connivance.⁴ We have seen above that confession of the wife is not a sufficient foundation on which alone to build a sentence of separation; but although by the rules of law, it cannot satisfy a judge, it must satisfy the mind of a husband, especially when direct and unequivocal.⁵ But where a wife confesses a guilty passion, but denies criminality, if a husband acts unwisely, the Court will not deny him his remedy unless it appears that he has acted corruptly.⁶

Collusion is an agreement between the parties, for one to commit, or appear to commit, an act of adultery, so as to suffer the other to obtain a remedy at law, as for a real injury. The law permits no co-operation for such a purpose, and refuses a remedy for adultery committed with such intent; but it is not proof of collusion that after the crime is committed both parties are desirous of a separation.⁷ A judgment by default suffered by the paramour, and the absence of any defence by the wife in the ecclesiastical Court, may be, but are not necessarily, proofs of collusion.⁸

1 3 *Hagg.* 94.

2 3 *Hagg.* 94, 96; 3 *Hagg.* 164.

3 3 *Hagg.* 81.

4 3 *Hagg.* 87. As to culpable neglect, amounting to criminal negligence, *vid. also* 3 *Hagg.* 153.

5 3 *Hagg.* 77.

6 3 *Hagg.* 141, 142, 143.

7 3 *Hagg.* 130.

8 3 *Hagg.* 130, 133; 1 *Hagg.* Con. 290

If a husband is once in possession of a fact of adultery, and still continues his cohabitation, it proves connivance, collusion, and facility, and bars his right to relief.¹ But he is not bound to show the time when the fact first came to his knowledge. It might be prudent and expedient for the success of his suit, that he should do so, but it is not absolutely necessary, something must be allowed for convenience.² But constant intercourse continued for four years between a wife and her paramour, not clandestine, but the common subject of conversation among servants and friends, raised a grave suspicion of the husband's knowledge and acquiescence;³ but still, in the particular case, the divorce was granted, as the husband could not be affected with knowledge. In the case of a wife, a want of promptness in noticing the infidelity of her husband, ought not to be pressed against her as barring her legal remedy, unless in very particular cases. Certainly a wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but she might have a reasonable hope of his return to her society; and forbearance under this *spes recuperandi* has never yet been held to constitute a bar to her legal remedy, when every hope of that kind should be extinct.⁴ A wife has not the same control over the husband, as a husband has over the wife; nor the same guard over his honour; nor the same means to enforce observance of the marriage vow.⁵ A facility to condone on the part of a wife seems meritorious, whilst a similar facility on the part of the husband would be degrading and dishonourable.⁶ The relative ages of the parties is proper to be pleaded; where the husband is much older than the wife, it may perhaps, impose on him an obligation to more vigilant superintendence.⁷

Though malicious desertion does not operate as a positive bar, yet if a husband withdraw without a cause, and when a wife required his active superintendence, it betrays a want of prudent attention and honest caution, which may, on other grounds, deprive him of his remedy.⁸

1 3 Hagg. 76, 83.

2 2 Hagg. Con. 279.

3 3 Hagg. 125.

4 3 Hagg. 125; 3. Hagg. 354.

5 1 Hagg. Con. 133; 1 Hagg. 793.

6 1 Hagg. 752, 766, 796; 3 Hagg. 78.

7 3 Hagg. 153.

8 1 Hagg. Con. 154; 2 Ad. 290.

An allegation not defensive in respect of adultery, but charging the husband with connivance, does not admit the charge of adultery.¹ But it seems questionable whether a party, especially a husband, can set up connivance as a defence, indirectly and incidentally, and by interrogatory only, without giving the other party a full opportunity to answer.² Although it is clear that the Court or a party may take the objection of connivance where it is clearly appears on the evidence adduced to establish the adultery.³ Indifference, ill-behaviour, or cruelty, is not pleadable in answer to a charge of adultery, nor relevant to a charge of connivance.⁴

A husband applying for a divorce must come with clean hands, if he have connived at his wife's adultery with A. he cannot take advantage of adultery with B. happening almost *about the same time* ; if he has relaxed with one man, he has no right to complain of another.⁵ But where the improper conduct of the wife was long antecedent, it was held no bar ; as where there had been a separation for five years, the husband was not barred of his remedy, by having connived at the improper conduct of his wife, previously to separation ; especially in a case where children had been born of the subsequent adulterous connection, who had been baptized by the name of the husband, for this may be a severe injury and an irreparable grievance, as the presumption of law is, that these are the legitimate children of the husband.⁶

Suits for divorces by reason of cruelty, *propter sævitiam*, are usually brought by the wife, as the more infirm party, though they may be, and indeed have been, successfully brought by the husband.⁷ Every thing is in legal construction *sævitia*, which tends to bodily harm, or to the injury of health, and in that manner renders cohabitation unsafe ; wherever there is a tendency only, to bodily mischief, it is a peril from which the wife ought to be protected, because it is unsafe for her to continue in the discharge of her conjugal duties.⁸ Unkind conduct, though accompanied by

1 3 Hagg. 58, 91.

2 *Fenton v. Fenton*, 3 Hagg. 352.

3 3 Hagg. 77 ; 3 Hagg. 125.

4 3 Hagg. 92.

5 3 Hagg. 87.

6 3 Hagg. 122 ; note b ; 3 Hagg. 147.

7 Hagg. Con. 409.

8 2 Hagg. Con. 149 ; 2 Phill. 96 ; 1 Hagg. Con. 409.

words of menace, is not legal *sævitia* unless they are expressions of determined malignity, or unless accompanied with blows ; if there are words of serious menace, it matters not that they are addressed to a third person, the test being, whether, or not, they excite reasonable apprehensions.¹ Nor is it necessary that there should be many acts ; the Court indeed is indisposed to interfere on account of one slight act, particularly in cases of long cohabitation, because if only one instance of ill treatment is proved, it may be hoped that it will not be repeated ; but unless there are some circumstances in the case restraining the Court, one act is fully sufficient to authorize its interference.²

Where a few days after her departure from her husband's house, the wife was found with severe bruises and injuries upon her person, which in the opinion of a medical man must have been caused by external physical violence, not occasioned by a fall or other accident, and the husband having been shown to have used violence towards her on other occasions, and in other ways had so conducted himself as to raise a strong presumption that the bruises and injuries were inflicted by him, the Court made a decree for alimony.³

In a suit by a wife for alimony on the ground of cruelty, her own conduct was proved to have been in some respects blameable, but several instances were established of gross cruelty towards her on the part of her husband far beyond what the provocation could justify ; the last proved instance of such cruelty occurred a few months before the husband left the country. Until this time they had lived together. During the husband's absence the wife, by arrangement with him, occupied a cottage of his and received a weekly allowance for the support of herself and their children. On his return, which took place some months afterwards, he refused to live with her, leaving her, however, in possession of the cottage, and continuing to pay her the same weekly sum as she received during his absence ; and it was proved that after his return he had said that he would not live with her ; that he was afraid they would

1 1 *Hagg.* 776 ; 4 *Hagg.* 285.

2 1 *Hagg.* Con. 459 ; 1 *Hagg.* 768.

3 1 *Jackson v. Jackson*, 8 Grant 400.

never agree, and that he might do something which would subject him to punishment; something which might bring a rope round his neck. *Held*, under these circumstances that the wife was entitled to a decree for alimony.¹ This case is interesting, as the difficulty of dealing with a husband who had deserted his wife as the law then (1852) stood is pointed out, and it was perhaps for the purpose of removing this difficulty that the subsequent statute of 20 Vic. c. 56 was passed.

A subsequent case² shows how valuable the powers given to the Court by 20 Vic. c. 56, and 22 Vic. c. 12 have proved to be. It was there held that the right of the wife is to reside with her husband in his home or the joint home of both; where, therefore, it appeared that the husband resided with his children (by a former wife) and compelled the wife to live at lodgings, the Court, although no violence or other ill-treatment was shown on the part of the husband towards his wife, made a decree for alimony in her favour; and that, although it was shown that during such time the husband had been in the habit of visiting and remaining with his wife.

In a suit for alimony the wife must prove herself aggrieved, otherwise there is no foundation upon which the Court can proceed to pronounce a decree for alimony. The defendant in his answer to an alimony suit, denied the acts of cruelty charged against him by the bill, and no evidence was given to establish the charges of cruelty, but at the hearing the defendant consented to a decree being made for alimony: the Court, on the grounds public policy, refused to interfere. In such a case the party could attain the object they had in view, of effecting a separation by arrangement out of Court: the objection to pronouncing the decree sought was, the Court doing that without proof of necessity for its intervention, which it can only properly do upon proof of such necessity.³

A groundless and malicious charge against the wife's chastity, followed by turning her out of doors, and which charge is not attempted to be pleaded or proved, may be alleged with other acts of

1 1 *Severn v. Severn*, 3 Grant 431.

2 2 *Weir v. Weir*, 10 Grant 565.

3 1 *Gracey v. Gracey*, 17 Grant 118.

cruelty, as a ground of separation.¹ So spitting on a wife, or obtaining her property by imposition, and compelling to depart by threats.²

What merely wounds the mental feelings whilst unaccompanied by bodily injury, either actual or menaced, can rarely be noticed by the Court; mere austerity of manners, petulance of temper, rudeness of language, a want of civil attention, even occasional sallies, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state, not innocent in any state, but still they do not amount to such legal cruelty, against which the law will relieve; still less is it cruelty, where it wounds not natural feelings, but those only arising from particular rank or situation, for the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; and though such considerations, when stated merely as matter of aggravation, are not absolutely excluded, yet, they cannot of themselves constitute legal cruelty.³ The main test is, can cohabitation subsist without personal danger? Where personal safety is in jeopardy, or there is reasonable ground to apprehend such a consequence, it is the bounden duty of the Court to protect from risk or danger.⁴ Necessity alone confers on the Ecclesiastical Court the power of putting those asunder whom God has joined, and a regard to personal protection must define the exercise of that power. But mere words, however reproachful, unless they inflict indignity and threaten violence, can never lay a foundation for a sentence of separation.⁵ A wife must endeavour to disarm such a temper by weapons of civility and kindness, if these fail, the law requires her to submit to the consequences of her own injudicious choice.⁶

The bringing a suit for restitution of conjugal rights is not necessarily a bar to a sentence of separation for cruelty, even where the imputed cruelty has been committed prior to such suit; nor are acts happening anterior to such suit, though not precisely

1 1 *Hagg.* 769: 1 *Hagg.* 163.

2 1 *Hagg.* 776.

3 1 *Hagg.* Con. 37, 39, 40.

4 4 *Hagg.* 265; 1 *Hagg.* Con. 351; 1 *Hagg.* 773.

5 1 *Hagg.* Con. 409; 2 *Hagg.* Con. 108; 2 *Phill.* 111 1 *Hagg.* 775.

1 *Hagg.* Con. 364.

in the nature of legal cruelty, to be altogether excluded from consideration, if they denote harshness and severity : but, still in ordinary cases, little reliance could be placed on them, when the conduct of the party in bringing such a suit seems so inconsistent with their existence.¹

But no wife can obtain the interference of the Court to protect her from treatment which she has drawn upon herself by her own misconduct, she must at *first*, at least, seek a remedy in the reform of her own manners.² If, however, it should appear, that even misconduct on the wife's part has produced a return from the husband, wholly unjustified by the provocation, and quite out of proportion to the offence, the Court would still interfere.³ It is not necessary that the conduct of the wife should be entirely without blame, for the reason which would justify the imputation of blame to the wife, would not justify the ferocity of the husband.⁴ The Court will also notice *relative* cruelty, for what may be tolerated by one, may not be by another.⁵ A husband's attempt to debauch his women-servants, is a strong act of cruelty ; so also is a groundless and malicious charge against his wife's chastity ; and though neither, of itself, would be sufficient for divorce, yet in conjunction with other acts, they would weigh as acts of intrigue and indignity.⁶ But the taking to a separate bed cannot be pleaded by the wife as an act of cruelty.⁷

Cruelty, like adultery, may be condoned, *Westmeath v. Westmeath*,⁸ and upon similar principles may be revived after condonation ; but, when cruelty generally consists of successive acts of ill-treatment, if not of personal injury, something of a condonation of the earlier ill-treatment necessarily takes place.⁹ In one case, where there had been a long separation, nearly twenty years, the court considered the effect of it, was to approximate the acts committed in the two periods of cohabitation ; if there had been no separation, the court would have considered the former acts as obsolete, and that the

1 4 *Hagg.* 272.

2 2 *Hagg.* Con. 159.

3 1 *Add.* 423.

4 1 *Hagg.* Con. 459.

5 1 *Hagg.* 782, and 1 *Hagg.* Con. 455.

6 1 *Hagg.* 760.

7 1 *Hagg.* 760, 775.

8 *Westmeath v. Westmeath*, 2 *Hag.* 112.

9 2 *Hagg.* Supp. 113.

husband was *emendatus moribus*, but the separation got rid of the intermediate years, and the former acts were to be looked at, as if they had happened recently.¹ But although condonation may be set up as an answer to a suit for cruelty, it seems that recrimination may not. In *Chambers v. Chambers*,² Lord Stowell says, "If the wife was the *prior petens* in a suit of cruelty, I do not know that she would be barred by a recrimination of that species, for the consideration would be very different, the court might not oblige her to cohabitation, which would be dangerous."

A plea of cruelty may be introduced with considerable effect, when adultery is, at the same time, charged against the husband ; because proof of cruelty, in such a case, adds greatly to the probability that the charge of adultery is well-founded ; for when the affections of a husband are estranged from his wife, they are more likely to be directed to less worthy objects.³ So also it may be admissible, as introductory to the history of an adulterous connection.⁴ Where cruelty and adultery are both charged, it may not be necessary to proceed on the charges of cruelty at all.⁵

A party being before the court on a charge of cruelty, acts of adultery, subsequent to the citation, may be pleaded.⁶ In a subsequent case, where it appeared that the husband was cited in a suit for cruelty, in February 1831, to which a defensive allegation on his part was admitted in June 1832 ; an allegation on the part of the wife was subsequently put in, pleading adultery by the husband in 1827, 1828, and 1829 ; it was contended that such allegation was not admissible, and that no case had gone so far as to allow acts of adultery to be pleaded which had taken place previously to the original suit, although acts of adultery subsequent to the suit had been admitted, though not contained in the original libel ; but the court not admitting the distinction, the allegation of the wife was admitted.⁷

A wife sued her husband for a divorce, on the ground that he had been guilty of unnatural practices, and a libel was given in

1 1 *Hagg.* 781 ; 4 *Hagg.* 511.

3 1 *Hagg.* Con. 146.

4 3 *Phill.* 500.

5 2 *Phill.* 67.

6 1 *Hagg.* 22.

7 *Sampson v. Sampson*, 4 *Hagg.* 238.

2 1 *Hagg.* Con. 452.

the consistorial court of York, pleading a conviction, and a sentence to two years imprisonment ; the court having rejected the libel, the cause was appealed to the court of delegates, who reversed the sentence of the court below, and decreed a divorce ; an act of parliament was subsequently obtained, by which the marriage was dissolved.¹

In *Mogg v. Mogg*, 2 Add. 292, the libel charged cruelty, and unnatural practices ; a distinction was attempted to be established between this and the case above, on the ground, that the latter was a conviction of an assault, with intent to commit, &c., whereas this was a conviction for endeavouring to persuade E. K. to permit him to take indecent liberties, a minor offence, though one of the same kind ; but the court, Sir J. Nicholl, said, " The case upon the whole amounts to that *par quod consortium amittitur*. Could the court send the wife home to such a husband ; he refuses her access to his person ; he resorts to abominable practices, cruelty itself, independent of that other charged ?"

A deed of separation is considered by the ecclesiastical court as an illegal contract, implying a renunciation of stipulated duties ; a dereliction of those mutual offices which the parties are not at liberty to desert ; an assumption of a false character in both parties, contrary to the real *status personæ* ; and therefore such deeds are not pleadable in bar of proceedings for adultery.²

It is not to be considered as a matter perfectly light in the behaviour of a husband, complaining to this court, that he has withdrawn himself from his wife, without cause, and without consent, from the discharge of those duties which belong to the very institution of marriage ; this malicious species of desertion, is a ground for divorce in some countries, certainly not so here ; but it will not justify a wife in a resort to unlawful pleasures, because lawful ones are withdrawn.³

Mere separation, in fact, cannot be made the ground of a divorce.

¹ *Bromley v. Bromley*, 2 Add. 159.

² 2 *Hagg. Con.* 142, 518 : 1 *Hagg.* 760, 789 ; 2 *Add.* 285, 302 ; 4 *Hagg.* 514.

³ 1 *Hagg. Con.* 154.

⁴ 1 *Hagg. Con.* 120, 154, 142 ; 2 *Add.* 290.

If the court were to grant separations, because the husband has thought proper to separate himself from his wife, it would be to confirm desertion, and gratify the deserter, and the court would then become the perpetual instrument of these voluntary and illegal separations.¹ Neither can desertion, though wilful, or as it sometimes called, malicious desertion be made a ground of separation, though in conjunction with cruelty it frequently is.²

The mere desertion of a wife by a husband, though a malicious desertion, will not bar a sentence of divorce, on proof of adultery committed by the wife. The long absence of the husband was not considered to amount to a desertion, in the case of *Sullivan v. Sullivan*, 2 Add. 299.

A suit for a divorce may be instituted at the instance of the parent or guardian of the minor; and the court, in a case where the wife's grandfather was appointed guardian, *ad litem*, on her mother's renunciation, would not enter into the question whether the husband might dispute the appointment of guardian, since it was enough, if a third person could not take advantage of the objection; for, there being a guardian apparently appointed with sufficient regularity, the court will presume the person sufficiently qualified to receive it, until the appointment is shown to have been invalid.³

So also the committee of a lunatic, may institute such a suit, in which case it was said by Lord Stowell, in *Parnell v. Parnell*, 2 Phill. 178: "The question resolves itself into two points: whether a lunatic is put out of the protection of the law, and secondly if he is not, whether there is any mode in which redress can be obtained; on the first there can be no doubt; and it never

¹ *Paley* in his *Moral Philosophy*, seems to consider this as a sufficient ground of divorce. *B. 3 P. 3 c. 7*; and it is admitted by the laws of Scotland and Prussia, and was so in France after the Revolution and before the Restoration. In *Scotland*, four years' desertion was the period fixed on by a statute passed in 1573; in practice, however, a shorter time is admitted; the first process is, to compel cohabitation; on the contumacy of the defendant, the marriage is dissolved, and the statute is considered as satisfied, if four years intervene between the first desertion and final sentence. In *America*, the practice varies in different States. In *Maine*, five years' desertion without cause, is required to be proved. In *Connecticut*, wilful desertion for three years is considered sufficient. *Kent's Comm. on American Law*, 105, n. Both the *civil* and *canon* law allow a divorce for long absence, but are not agreed as to the period; in one place it is said, after two years; in another, after three; others have held that the *civil* law requires five years. In the council of *Lateran*, a sentence was allowed by the whole council, which was given by a bishop, pronouncing a divorce for a woman, complaining that her husband had been absent ten years; giving also leave to the woman to marry again. But the truth is, no absence, be it for any time whatsoever, doth properly cause a divorce at law. *Godol. Abr.* 494.

² 1 *Hagg. Con.* 120; 2 *Add.* 299.

³ 1 *Hagg. Con.* 6.

can be asserted, that the wives of lunatics should be universally released from the duties of their marriage vow. It would be an imputation on the laws of this country, to suppose that it had not provided some remedy against such a mischief. Upon principle, the powers of the committee must be upheld, to protect the lunatic from the greatest of all possible injuries." And it was also said, that the lunatic would have the power of condonation, if he recovered; or might stand on what had been done for him.

There is no limitation of time for bringing a suit for divorce on the ground of adultery. "*Quamvis accusandi jus de adulterio quoad penam criminalem et civilem præscribitur quinquennio, quoad divortium tamen petendum, nunquam præscribitur.*"¹ No limitation is imposed by statute, or by any rule which the court has laid down for itself. The court has no power by law to refuse relief merely on the ground of lapse of time. Courts of law do not afford any conclusive rule which should bind the ecclesiastical court in such a question.² The first thing the court looks to, when a charge of adultery is preferred, is the date of the charge relatively to the criminal act charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer, either an insincerity in the complaint, or an acquiescence in the injury, whether real, or supposed, or a condonation of it. It, therefore, demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations.³ For the purpose of explaining delay in such a case, the affidavit of the husband, the plaintiff, was admitted to be read, though objected to, on the ground that no evidence of the wife or husband could be heard in such a case; and that the cause which was concluded must be determined by the proofs exhibited in it; but the court said that the wife did not suggest connivance or condonation as a ground of defence, and it was necessary for the husband to explain the delay in order to satisfy the conscience of the court;⁴ but where not so accounted for, condonation was presumed from the

¹ *Sanchez* lib. 10, disp. 3; *Poynter*, 204.
² *Hagg. Con.* 313.

² *1 Hagg. Con.* 183; *1 Hagg.* 740 n.
⁴ *2 Phill.* 168.

delay, and the suit dismissed.¹ A husband may wait in order to obtain adequate proof, but no longer.² But this doctrine is not to be pressed against a wife. Forbearance on her part may be excusable and even meritorious.³ Therefore mere lapse of time will not bar a wife's remedy.⁴ Even in the case of a husband, it is not, it seems, invariably expected that he should show when a charge first came to his knowledge.⁵ In *Elwes v. Elwes*,⁶ the court observed, "A husband has suspicions, he has some intimations, he has enough to convince his own mind but not to instruct a legal case. In that distressing interval his conduct is nice; it is difficult to refrain from cohabitation, as the means of discovery would be frustrated, and if he continues cohabitation, it then becomes liable to imputation." How far delay to institute proceedings leads to an inference of condonation or connivance has been already shown.

It was solemnly decided in *Lolly's case*,⁷ that as by the law of England marriage was indissoluble, and not to be dissolved but by an act of parliament, it could not be dissolved by the courts of another country. The judges held the conviction right, being unanimously of opinion that no sentence or act of any foreign country, or state, could dissolve an English marriage *a vinculo matrimonii* for grounds on which it was not liable to be dissolved *a vinculo matrimonii* in England. The same question also arose, very shortly afterwards in the house of lords, in *Tovey v. Lindsay*.⁸ In that case there was no decision, Lords Eldon and Redesdale considering the question too important to be decided upon the case as it was then brought up.⁹

1 2 *Phil.* 153.

2 3 *Hagg.* 181; and *vid. Dobbys v. Dobbys*, Poynter, 235; *Ruding v. Ruding*, Poynter, 231.

3 1 *Hagg.* Con. 133.

4 1 *Hagg.* 740, n.; *id.* 766.

5 1 *Hagg.* Con. 292.

6 1 R. & R. C. C. 226.

5 2 *Hagg.* Con. 279.

8 1 *Dow.* P. C. 117.

9 In America this question excites anxious consideration, from the intermarriages of citizens of different states of the union, each state being independent and governed by its own laws. Chancellor Kent, in his *Commentaries*, p. 107, says, "Assuming that in ordinary cases the constitutionality of the laws of divorce in the respective states is not to be questioned, the embarrassing point is, how far a divorce in one state has a valid operation in another? If a husband and wife were married, and reside in a state, where divorces are not at all permitted or not to the extent, and for the same causes as in other states; and the parties, or one of them, retire into another state for the express purpose of procuring a divorce, and having obtained its return to their native state and contract other matrimonial ties; how are the courts of the states, where the parties had their home, to deal with such a divorce? When a divorce was brought in such a case, the court in Massachusetts properly refused to sustain a libel for a divorce and sent the parties back, to seek such relief as the laws of their own domicile afforded. The supreme court of New York has refused to assist a party, who had thus gone into another state, and obtained a divorce on grounds not admissible in New York, and procured an evasion of its laws. They would not sustain an action of alimony founded on such a divorce; In another case it held a divorce in another state obtained by the husband, when the wife resided out of the state, and had no notice of the proceeding, null and void; because the court had no jurisdiction over the

Beazley v. Beazley,¹ was a case of nullity of marriage promoted by the wife on the ground of a former marriage. The question arose, whether such former marriage was dissolved *a vinculo* by a divorce in the commissary court of Scotland, so as to enable the husband to marry again; the marriage pretended to be dissolved, having taken place in England, the second marriage in Scotland

The court, Dr. Lushington, said "Cases have been cited, in which it is alleged that a final decision has been pronounced by very high authority upon the operation of a Scotch divorce on an English marriage, that it has been determined, that a marriage celebrated in England cannot be dissolved by the sentence of a Scotch tribunal, and that the contract remains for ever indissoluble. The authorities principally relied upon for establishing that position, are the decisions of the twelve judges in Lolly's case, and the decision of the present lord chancellor, on a very recent occasion, *McCarthy v. Le Caix*. If those authorities sustained to its full extent the doctrine contended for, the court would feel implicitly bound to adopt it; but I must consider whether in Lolly's case it was the intention of those very learned persons to decide a principle of universal operation absolutely, and without reference to circumstances; or whether they must not, almost of necessity, be presumed to have confined themselves to the particular circumstances that were then under their consideration. Lolly's case is very briefly reported; none of the authorities cited on the one side, or on the other are referred to, nor are the opinions of the learned judges given at any length; all that we have, is the decision.

"In that case the indictment stated, that on the 18th of July, Lolly was married at Liverpool, to Ann Levaia, and afterwards to Helen Hunter, his former wife being then living. It was proved that both marriages were duly solemnized at Liverpool, that the

case, when they had none over the absent wife. So also, in the supreme court of Massachusetts, in the case of a divorce fraudulently obtained. Sentences obtained by collusion being mere nullities, and all other courts having power to examine into facts upon a judgment obtained by fraud." He adds, "The question is, whether, if such a divorce be procured in another state by parties submitting to the jurisdiction, and after a fair investigation of the merits of the allegations upon which the decree was founded: such a decree be entitled to be received as valid and binding upon the courts of the native state of the parties. A graver question cannot arise under this title in our law." The learned author then enters into an able discussion of the question, reviewing the decisions of our courts and of the commissary courts in Scotland. It appears that, upon the principles of the English law, a marriage contracted in New York cannot be dissolved except for adultery by any foreign tribunal out of the United States, because the *lex loci contractus* ought to govern. *Kent*, 117.

1 3 *Hagg. 689*.

first wife was alive a week before the assizes, and that the second wife agreed to marry the prisoner, if he could obtain a divorce. The jury did not find that any fraud had been committed; but there does not appear to have been any discussion upon the very important question of domicil. A case in which all the parties are domiciled in England, and resort is had to Scotland, (with which neither of them have any connection) for no other purpose than to obtain a divorce *a vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced; as where, prior to the cause arising, on account of which a divorce was sought, the parties had been *bona fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to, assume it to have been established as an universal rule, that a marriage had in England and originally valid by the law of England, cannot under any possible circumstances, be dissolved by the decree of a foreign court.

“ Before I could give my assent to such a doctrine (not meaning to deny that it may be true,) I must have a decision after argument upon such a case as I will now suppose; viz., a marriage in England the parties resorting to a foreign country, becoming actually *bona fide* domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. If a case of that description had occurred, and had received the decision of the twelve judges, or the other high authority to which allusion has been made, then indeed it might have set this important matter at rest: but I am not aware that that point has ever been distinctly raised, and I think I may say with certainty that it never has received any express decision.”

When the above case came before the court for final judgment, the learned judge said, “ One only distinction exists between this case and that of Lolly’s, viz., that here the second marriage took place Scotland; in neither case is there any proof of collusion in resorting to Scotland; and in neither case is there any domicil in Scotland; and, as in my judgment the question of domicil might form a most important and distinguishing feature, the due effect of a Scotch domicil on the decision of these cases would demand a very careful consideration. That, however, does not arise in the present case.

"It is useless, however, to reason from principles or analogy, I am bound by authority ; for since it now appears that neither of the parties to the first marriage, were at any time *bona fide* domiciled in Scotland, no sound distinction exists between the present case and that of Lolly ; I, therefore, pronounce the second marriage null and void. My judgment, however, must not be construed to go one step beyond the present case, nor in any manner to touch the case of a divorce *a vinculo*, pronounced in Scotland between parties, who though married when domiciled in England, were at the time of such divorce *bona fide* domiciled in Scotland ; still less between parties who were only on a casual visit in England at the time of their marriage, but were both then and at the time of the divorce *bona fide* domiciled in Scotland."

Restitution of Conjugal Rights.

Having considered the law of divorce it will be convenient now to consider that relating to the restitution of conjugal rights, for our Court has been given power to decree alimony in cases where by the English law the wife would be entitled to this relief.

Restitution of conjugal rights is a suit wherein it is the practice to plead on behalf of the promoter that the party complained of has withdrawn from cohabitation without lawful cause, and concludes with a prayer that such party may be compelled to return and treat the complainant with conjugal affection.¹ But the Ecclesiastical Court can only interfere where cohabitation is *suspended* ; where, therefore, a libel charged, "that the said Margaret Orme, though allowed by the said Robert Orme to reside in the same house with him, was denied access to his person and bed ;" it was rejected, on the ground that, cohabitation continuing, the Court could not inquire as to the terms on which it was maintained.² But where, in a suit for restitution, the usual decree had been pronounced, "to take his wife home and *treat her with conjugal affection*," and to certify his obedience on a given day as a preliminary step to his dismissal from the effect of the original citation ; and it appeared that though the wife had returned home, the husband,

¹ 1 *Hagg. Con. Sup.* 6.

² The duty of matrimonial intercourse cannot be compelled by the ecclesiastical court, though matrimonial cohabitation may ; 1 *Hagg. Con.* 154, per Lord Stowell : *Orme v. Orme*, 2 Add. 382.

without actually ejecting her, had treated her with anything but conjugal affection, the Court refused to dismiss the husband.¹

Where in a suit for alimony, it appeared that the plaintiff's absence from her husband's residence was voluntary, and that any grounds for annoyance to her whilst residing with her husband arose almost, if not entirely from her own violence of temper, and that her husband was still willing to receive her back and support her; the Court at the hearing dismissed the bill, but ordered the defendant to pay the costs of the suit to the plaintiff.²

A married woman voluntarily left her husband's house, alleging as a cause, unkind treatment by the husband, but subsequently, offered to return, when he refused to receive her. Upon a bill filed for alimony, the Court made a decree referring it to the Master to fix an amount to be paid to the plaintiff for alimony, during such time as the parties continued to live separately.³

Where, in a suit for restitution of conjugal rights, a marriage in fact, or the validity of it, is denied, the suit assumes the shape of a suit of nullity of marriage.⁴

This suit, like a suit for divorce, may be barred either by cruelty, or adultery,⁵ and upon adultery being pleaded and proved in answer to a suit for restitution, a divorce may be decreed, and it is not necessary to institute a cross suit for that purpose.⁷

So also, a plea of cruelty or adultery may be met by a counter-plea of condonation.⁸ So also misconduct previous to condonation, may be revived by misconduct subsequent.⁹

But where, in consequence of the violent conduct of a husband, the wife insisted upon, and obtained a deed of separation, but was induced, by the entreaties not only of the husband, but of her own family, to allow the husband to occupy a bed-room in her house, upon his express declaration, that he should be considered only as

1 *Orme v. Orme*, 2 Add. 382.

2 *McKay v. McKay*, 6 Grant, 280.

3 *English v. English*, 6 Grant, 580.

4 *Swift v. Swift*, 4 Hagg. 153; and *vid. Grant v. Grant*, 1 Lee, 502.

5 *Oliver v. Oliver*, 1 Hagg. Con. 361.

6 *Best v. Best*, 1 Add. 411.

7 3 Hagg. 638; 4 Hagg. 261; 2 Hagg. Sup. 65.

8 *Weston v. Weston*, 2 Hagg. 115; 3 Hagg. 629.

9 *Ibid.*

a lodger having no right to cohabitation, and no control or authority in the house, or over the servants, and should be in the house merely by sufferance ; and no matrimonial intercourse, in fact, took place during his stay there, the Court refused to consider such a residence as condonation.¹

Where there are faults on both sides, and the injuries of the complainant are ascribable to the provocation offered, or where they were received accidentally in a scuffle ; where, in short, there is no reason to impute malignant intention, the law will oblige the wife to return to her husband.²

In *Bramwell v. Bramwell*,³ the Court said, " if the witnesses lay a sufficient ground for the Court to conclude that a wife's return to cohabitation would be attended with a reasonable apprehension or a probable danger of personal violence, the Court will release her from the duty of such return." In that case sentence of separation was pronounced, in a suit for restitution of conjugal rights by the husband, on proof of undue familiarity of the husband with a woman with whom he held correspondence, clandestine communication, shewing great warmth of passion, with frequent opportunities of guilt, though no credible fact of adultery was proved.

In a case where a wife refuses to return to her husband on account of violent conduct, it is not necessary, in defence to a suit by her husband for restitution of conjugal rights, for her to shew that her conduct was entirely without blame ; for the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband.⁴

Where the wife is acting on the defensive, she is not relieved from the proof of necessary facts, yet, under such circumstances, the inference arising from facts, when established, may be stronger than where she is the original complainant ; thus, where a suit for restitution is promoted by the husband, the wife is not, accord-

1 *Westmeath v. Westmeath*, 2 Hagg. 118.

2 *Oliver v. Oliver*, 1 Hagg. Con. 372.

3 2 Hagg. 686, and *vid.* 2 Hagg. Sup. 129.

4 1 Hagg. Con. 463 ; 2 Hagg. Sup. 72.

ing to the doctrine and practice of the Ecclesiastical Courts, held to the same strictness of proof, as in an original suit by her.¹

If a wife separate herself from her husband, on account of legal cruelty on his part, and afterwards is induced by his entreaties, seconded by the wishes of her own family to return to matrimonial cohabitation, the law presumes, that when she so returns she condones former injuries, upon the understanding and expectation that she is to be treated with conjugal kindness; and if the husband fails to do so, such former injuries would be revived by subsequent misconduct of a slighter nature, than that which would be required to constitute original cruelty, and for the plain reason, that the apprehension of danger would be more easily and justly excited; and the law, therefore, though not allowing a wife to separate herself from her husband from mere fancy or caprice, would not compel her to return to cohabitation.²

The Ecclesiastical Courts do not consider an agreement for separation, as in any way affecting the legal rights of parties; and although it may contain an express covenant not to bring a suit for the restitution of conjugal rights, it is not a bar; and indeed has been said to offer no impediment to a suit of such a description.³

In one case in which articles of separation, containing a covenant of this nature, were pleaded, Sir W. Wynne said, on overruling such plea, that he believed it was the first time the question had come directly before the Court, and that he was surprised that it should be brought forward.⁴

A suit for restitution of conjugal rights, strongly infers that at the time of instituting such suit, the party had no reasonable ground to apprehend personal violence, but it does not amount to an absolute bar to a sentence of separation for antecedent cruelty; *a fortiori* it would not exclude the wife from pleading acts of harshness and severity, previous to such suit, in conjunction with acts of cruelty subsequent.⁵

¹ 3 Hagg. 619.

² *Westmeath v. Westmeath*, 2 Hagg. Sup. 114; 3 Hagg. 636.

³ 2 Hagg. Sup. 116.

⁴ 2 Hagg. Sup. 44, n.

⁵ 4 Hagg. 288.

Amount of Alimony.

The Ecclesiastical Courts in England, exercised an equitable jurisdiction in settling the amount of alimony, varying in some degree with the position of the parties: thus where the wife is proceeded against by the husband for adultery, though the Court cannot assume her to be guilty of the offence till it is proved, still that is a sort of charge which ought to make her content to live in decent retirement, and on that account a comparatively small allotment of alimony is in such a case given during the pendency of the suit; but a different principle will, it seems, be adopted where the wife brings the suit, and is the complainant, and where there is no complaint against her.¹

No provision as alimony can be made for a wife until the fact of marriage is either proved against the husband or admitted by him.² There was a case where an application was under the day immediately preceding a long vacation, for *interim* alimony, allowed by the English Ecclesiastical Court, *pendente lite*. The Court said that it was incompetent to it, *in point of form* to make any allotment to the wife as prayed, there not only being no *constat* of the husband's faculties;³ but a marriage, *de facto* even, though pleaded against, being neither proved, nor confessed by the husband. It recommended however, that in effect, the wife shall be alimenated proportionally to the husband's means and during the long vacation, intimating that it should take this into the account when, in the progress of the suit, alimony *pendente lite*, came to be regularly allotted, if its recommendation were not complied with.

Interim alimony, as its name imports, is given only as a temporary provision for the wife, and ceases when the court has finally settled the rights of the parties after having heard the cause. If at the hearing, she establishes her right, the decree orders *permanent* alimony, and usually refers it to a Master to settle the amount. If she fails, her bill is dismissed, and the *interim* alimony of course

1 *Rogers' Ecc. Law*, 38, citing *Rees v. Rees*, 3 Phill. 390 1 *Hagg.* 23, 526, 530; 2 *Hagg. Con.* 190 Phill. 152

2 *Smyth v. Smyth*, 2 Addam 254.

3 This expression means "No plea or declaration, which the Court required the husband to make on oath, disclosing his means or income; his 'faculty' or the extent of his ability to pay the alimony which might be allotted."

ceases. It may here be observed that where permanent alimony is decreed, it is to be computed from the date of the decree pronounced on the hearing.¹ And where *interim* alimony is ordered it is to be computed from the date of the order.²

The first reported case in this Province on this point is *Soules v. Soules*, just referred to, where it was held that the Court of Chancery will, in a proper case, grant *interim* alimony *pendente lite*.

Interim alimony is thus obtained, the bill being filed. Evidence by affidavit is provided proving the marriage. The affidavits are filed, and a notice of motion in Chambers based on the bill and affidavits is served in the usual way on the defendant. It was usual to verify the allegations in the bill by affidavit, but it has been decided³ that proof of the marriage only is necessary.

Interim alimony will be granted on *prima facie* proof of the marriage, although the validity of the marriage is disputed.⁴ On an application for *interim* alimony, the validity of the alleged marriage cannot be tried. If a marriage *de facto* is proved, it is sufficient. But to obtain an order for *interim* alimony, the plaintiff must show she is in want of means of support. When the parties had been living separate for four years, and the wife did not allege she was in want of means of support, and the husband swore she was in better circumstances than he was, an order was refused.⁵ An application for *interim* alimony must be upon notice.⁶ Where, in an alimony case, no one appearing for the defendant, an order had been made for *interim* alimony for the amount endorsed on the bill, which the defendant considered excessive, a reference was directed on payment of the costs (*dives costs*), of the application.⁷

Marriage once established, the husband is liable to pay for maintenance *pendente lite*, and costs of suit, whether the cause be for adultery, the object of which is divorce, or in cases of impotency,

1 Per Spragge, V.C., in *Soules v. Soules*, 3 Grant, 121.

2 *Ibid.* 116; but see *Howe v. Howe*, 3 Cham. Rep. 494, where it was held that *interim* alimony runs from the time of the service of the bill, if there has been no want of diligence on the plaintiff's part in making the application.

3 *Nowlan v. Nowlan*, 1 Cham. Rep. 308.

4 *McGrath v. McGrath*, 2 Cham. Rep. 411.

5 *Bradley v. Bradley*, 3 Cham. Rep. 320.

6 *Swinarton v. Swinarton*, 2 Cham. Rep. 463.

7 *Hooper v. Hooper*, 3 Cham. Rep. 114.

and other cases of nullity;¹ and such rule is adhered to, although fraud in procuring the marriage is expressly charged on the wife by the libel, and although costs are prayed, and may be ultimately awarded against the wife.² In an alimony case where the marriage is admitted or proved, *interim* alimony will be granted almost as a matter of course; and notwithstanding that defendant swears he is willing to receive and maintain the plaintiff.³

On an application for an order for *interim* alimony the affidavit as to the marriage should state such particulars as to it (by whom solemnized, &c.) that the Court may judge for itself whether it has been duly solemnised or not.⁴

In a suit for alimony,⁵ the defendant having signed a consent to an order being made directing him to pay the plaintiff a certain sum for alimony, a motion was made in Chambers for an order in terms of the consent; but the Chancellor said—"If this order were made as consented to, it would amount in reality to a decree in the cause: the matter must be brought before the full court."

In England upon an application for alimony the Court required, on the part of the husband, a statement both of his casual and certain income to be set forth in a plea called the "allegation of faculties," and required his personal answer on oath, which the wife might insist on, even if the husband were in India; the answer of the attorney being held insufficient; and in the meantime the Court allotted the wife a sum of money on account of alimony, and directed a monition to issue against the attorney for the payment, in a case where he long conducted the cause on his own authority and exhibited no proxy.⁶ The personal answer of the husband having been given on oath, the Court determined upon the answer, taking into consideration all the circumstances of the case,—what should be the amount of the alimony *pendente lite*, to enable the wife to carry on the suit, or what the amount of permanent alimony, in case the suit had been brought to a conclusion. It was usual for the wife to accept the answer of the

1 *Rogers' Ecc. Law*, 36, citing 1 *Lee*, 209.

2 *Carr v. Carr*, 2 Cham. Rep. 71.

3 *Taylor v. Taylor* 1 Cham. Rep. 234.

4 *Craig v. Craig*, 1 Cham. Rep. 41.

5 *Rogers' Ecc. Law*, 36; citing *Fraser v. Fraser*, E. T. 1819; *Poynter*, 248.

6 *Ibid.* citing 3 *Add.* 62.

husband, particularly when reformed by order of the Court, but she was in no manner compelled to acquiesce in his valuation, and it was open to her to dispute his answer, and to examine witnesses on it, if she thought proper; such a right, however, was not allowed to be exercised wantonly, but with caution and tenderness. It is hardly ever necessary, especially in cases of considerable property to enter into an inquisitorial scrutiny of its exact value; it is to be taken upon a fair general estimate.¹ Nor is a statement of the amount of capital, or an exposure of the particulars of partnership concerns required.²

An assignment apparently fraudulent and colorable, by the husband of all his property after the commencement of a suit by the wife for divorce, cannot affect her title to alimony *pendente lite*. The Court allotted alimony *pendente lite* at the rate of £50 per annum, out of an income of £140, and refused to allow the motion not to issue till after fifteen days.³

In granting alimony a careful regard is to be had to the husband's means, and the difference between existing property and an income derived from personal exertion.⁴

In another case,⁵ the Court said—"Taking then the income of the husband at £250 per annum, and considering that he has two children to educate and maintain, and that he will have to pay the expenses of this suit on both sides. I allot to the wife the sum of £75 per annum as alimony *pendente lite*; she must have the means of furnishing herself with a decent subsistence." Station in life, and the wife's fortune, or the fact that she brought no fortune are equally to be considered.⁶ The admission of a husband as to faculties (means, or income) is to be taken strongly against him.⁷ Alimony pending a suit is always less than that which is assigned after proof of the delinquency of the husband, one-fifth of the net income being the usual proportion.⁸ The nature of the suit, the charge made, and the answers given in are to be considered in granting alimony *pendente lite*. And although the part which

¹ *Rogers' Ecc. Law*, 26, citing *Brisco v. Brisco*, 2 Hagg. Con. 199; and see 2 *Lee*, 284.

² *Rogers' Ecc. Law*, citing 2 Hagg. 472, *Higgs v. Higgs*.

³ *Brown v. Brown*, 2 Hagg. E. R. 5.

⁴ *Hawkes v. Hawkes*, 1 Hagg. 526.

⁵ *Horrie v. Horrie*, 1 Hagg. 353.

⁷ 2 *Lee*, 595.

⁶ *Ibid.* 351.

⁸ *Hawkes v. Hawkes*, 1 Hagg. 526.

the wife takes in the suit does not affect her claim to alimony pending the proceedings, yet it is a circumstance of importance as regulating the quantum, especially if it should be supposed that she adheres to an adulterous connection, for it can hardly be doubted but that in such a case the amount would be no more than with some regard to her situation, and the fortune she brought would be absolutely necessary for her maintenance.¹ In one case which was an application for temporary alimony the husband having £1500 per annum, and the wife a separate income of £300 per annum, the Court added £200; afterwards both cruelty and adultery having been proved against the husband, one half of the whole income was allotted as permanent alimony.² But this large proportion was given because the bulk of the fortune originally belonged to the wife, and having been settled on her, she was induced by the hope of better treatment to give it up to her husband. He had been not only adulterous, but cruel—and, in order to buy off his cruelty, he obtained possession of the property which had been settled on his wife. This principle of a moiety by way of permanent alimony has been adhered to in other cases, especially where the wife has brought a fortune, and the conduct of the husband has been vicious and profligate.³

In one case where the joint income was £5500 per annum, the Court deducted for the expense of educating children, and allotted £2000, or about a moiety of the remainder to the wife.⁴ In another, indeed, £250 or only one-third, the wife taking charge of an only child.⁵ In another case, the income being £12,000 per annum, and the husband and earl, one-third was allowed as permanent alimony, and in reply to an observation that the wife had brought a large fortune, it was answered that she had got rank in return, and that the husband had the dignity of the peerage to support.⁶ But in two cases of tradesmen, whose incomes were stated at £300 per annum each; £80 in one case and £75 in the other, was allowed as permanent alimony.⁷ In another, £185 out of £527, or nearly two-fifths.⁸ Upon a general principle, after separation, by misconduct

1 *Rogers' Ecc. Law*, 37, quoting *Poynster*, 251.

2 *Smith v. Smith*, 2 Phill. 152-235.

3 *Cooke v. Cooke*, 2 Phill. 44.

4 2 Phill. 110.

5 1 Hagg. 532.

6 2 Phill. 43, 236, and *vid.* 1 Hagg. 526; 2 Hagg. Con. 201.

7 2 Phill. 44, 45.

8 2 Add.

of the husband, the wife is entitled to be alimanted as if living with him as his wife.¹

The following cases in our own Court on this point, show how far the English rules as here laid down will be followed in this province.

The defendant was the owner of real estate of the annual value of about £112, but subject to a debt of £100. He had also household furniture and farm stock, and he worked his farm; the plaintiff with her eight children, lived apart from the defendant on account of his cruelty, and with no means of support, save such as might be obtained by way of alimony. On a reference to the Master to fix permanent alimony, he allowed £37 10s. per annum. On appeal this sum was increased to £80 per annum.²

The rule that the conduct of the wife should weigh much in determining the amount of alimony is a reasonable one; the Court in settling the amount considered it with the other circumstances of the case; the wife's temper had occasionally been of a violent character, and his treatment of her had been unreasonably severe. The Court adopted the husband's income as the guide for fixing the sum to be paid. Allowance of alimony increased from £25 to £200 per year, it being shown that the husband's income had increased to such an extent as to justify the additional allowance.³

The independence of a wife may, in some cases, relieve a husband from the charge of alimony *pending proceedings*; but cannot, except perhaps where there has been gross misconduct on her part, tend to his entire exoneration; for if a wife being promoter establishes her case, or has been vexatiously proceeded against, the insufficiency of the means of the husband is no reason why he should not pay alimony, and also costs, when his own conduct has made him liable.⁴ In calculating a wife's separate income, the salary as a lady of the bed-chamber being subject to great expenses, was held to have been properly omitted, *aliter* of a royal grant of a pension to her, which by 2 & 3 W. IV. ch. 116, was made

1 2 Hagg. 7; 1 Hagg. 530.

2 McCulloch v. McCulloch, 10 Grant, 321.

3 Severn v. Severn, 7 Grant, 109.

4 2 Hagg. Cou. 214.

secure by law and was not fluctuating.¹ If the husband violates the marriage contract, it might be equitable perhaps, that he should lose the whole benefit of it, and give up the whole of his wife's property, at all events it would be unjust to deprive her of any considerable portion of the property she brought, in order to support the husband in public scandal and enable him to continue his adulterous connection and to provide for the issue which are the fruits of it.²

If the question of alimony be fixed by the local ordinary, the Court above will not on slight grounds disturb the sentence.³

It is desirable that, "the allegation of faculties" should be given in at an early period, and that the question of alimony should be disposed of in the first stage of the proceedings to prevent the husband from being unnecessarily harassed with demands for the wife's debts.⁴ For until there is a *constat* of the husband's faculties the Court, it seems is, in point of form incompetent to make any allotment to the wife; thus where a libel, after having been reformed, was admitted on the court day immediately preceding the long vacation, the court recommended that in effect the wife should be alimented according to the husband's means, during the long vacation, intimating that it would take this into account when in the progress of the suit, alimony *pendente lite* came to be regularly allotted, if its recommendation was not complied with.⁵

Nor ought the court to act before the husband's answers are given in, thus, where in a suit by a husband in a local court for a divoroe for adultery, an allegation of faculties was admitted but before the husband's answers were given in, or any witnesses examined thereon, the judge, without any proof of the husband's estate, settled an alimony of twenty shillings a-week on the wife, and the husband appealed, the court pronounced for the grievance.⁶ Where the allegation of faculties had been given in by the wife, she being the defendent, in which she admitted a separate income, and it was proposed to read an affidavit of the

1 3 Knapp, P. C.

2 2 Phill. 40; 2 Phill. 109; 3 Phill. 391; 3 Hagg. 322, 657.

3 2 Add. 1; 2 Phill. 41.

4 Brisco v. Brisco, 2 Hagg. Con. 199.

5 Smyth v. Smith, 2 Add. 254.

6 Butler v. Butler, 1 Lee, 88.

husband as to his income, in contradiction to the allegation, the court refused to allow it to be read, and admitted the allegation and condemned the husband to pay costs, but decreed nothing as to alimony till the proofs were before the court.¹

If the circumstances of the husband should alter, if he is *lapsus facultatibus*, it is competent to him, if done without delay, to apply to have the allowance reduced, if his means are diminished.² Or to the wife to apply for additional income if they are improved.³ But unsuccessful speculations by the husband, whereby his means are diminished, seems to furnish no ground for reducing the allowance.⁴

After a decree of alimony had been made, and alimony paid for several years under it, the court entertained a petition by the husband to be relieved from the decree, on the ground of adultery subsequently committed by the wife. On the hearing of this petition an act of adultery was sworn to by two credible witnesses; and the general conduct of the wife raising no presumption in her favor, an order was made as prayed.⁵

An offer by a husband to support his wife separately is no bar to a suit for alimony; and an affidavit of the husband showing his willingness to support his wife cannot be received.⁶

Where both parties have long abstained from applying to the court, the one for a reduction, the other to enforce regular payment, the court will not reduce the amount on account of the wife's debts incurred by reason of the non-payment of the alimony; nor will it reduce it on account of waiver by the wife, the additional expenses to the husband by the advanced ages of children, the failure from mismanagement of her trustees of a portion of funds set apart for alimony, or a slight addition to her means *abunde*.

Alimony is due from the return and not from the issue of the citation, though considerably prior to the return unless possibly under special circumstances.⁸ But it ought to be paid before the hearing.⁹

1 2 *Lec.* 264.

2 3 *Hagg.* 329; 3 *Add.* 276.

3 *Severa v. Severn*, 14 *Grant*, 150.

4 3 *Hagg.* 322; 3 *Phill.* 391.

5 1st *Lec.* 692, "Appeal."

2 2 *Phill.* 110; 3 *Phill.* 391.

4 4 *Hagg.* 273.

6 *Weir v. Weir*, 1 *Cham. Rep.* 194.

8 2 *Add.* 253; 3 *Phill.* 391.

On appeal the alimony runs from the date of the sentence appealed from, and not from the mere return of the inhibition.¹ If sums have been advanced,² or debts paid by the husband since the alimony became due, the amount may be deducted from the sum decreed;³ but the payment of such debts seem to afford no reason for any permanent alteration in the amount.⁴

Besides alimony pending suit, the wife is also entitled to payment of costs necessarily incurred either in the promotion of the suit, if proceeding against her husband, or in her defence when proceeded against.⁵ And where she has no separate property, she has a right to have her costs taxed *de die in diem*.⁶ But although it is the general rule that the husband should pay costs on whichever side the suit was brought, it is only on the presumption that the husband had everything and the wife nothing, when the contrary appeared both law and presumption were ousted, and the general rule will be entirely or partially abandoned.⁷

In suits of alimony the plaintiff, when she succeeds, is entitled as a general rule to her full costs of suit.⁸

The test in regard to the allowance of costs in alimony suits appears to be whether or not they have been vexatiously incurred. Therefore, where notice of examination and hearing was given and afterwards countermanded, upon its coming to the knowledge of the wife, after notice had been given that the husband intended to produce a witness from abroad to prove adultery on her part while on ship-board, what was done having been done in good faith, and the countermand given in order that she might be prepared to rebut so serious a charge against her, it was deemed reasonable that the costs in relation to such notice and countermand shall be paid by the husband to the solicitor of the plaintiff.⁹

If the wife is aggrieved by the non-payment of the sum allotted for alimony, she should make her application to the ecclesiastical

1 1 *Lee*, 261; 1 *Phill.* 210; 3 *Phill.* 267; 1 *Hagg* 528.

2 1 *Hagg*, 23.

3 1 *Hagg*, 353.

4 3 *Hagg*, 322.

5 3 *Phill.* 98.

6 3 *Phill.* 262; 1 *Hagg*, 168, 475, 787; 2 *Hagg*, 133; 4 *Hagg*, 511.

7 2 *Hagg*, Con. 203; 2 *Add.* 276.

8 *Soules v. Soules*, 3 Grant, 313. The rule as to costs has been lately changed in this Province by ch. 18 of the Statute of Ontario, 32 Victoria, passed 23 January, 1869, the first section of which provides that no costs *de die* are to be paid beyond the cash disbursements properly made by the plaintiff's solicitor; and section 2, that, where the plaintiff fails to obtain a decree, no costs shall be given beyond the amount of the cash disbursements properly made by the plaintiff's solicitor.

9 *Glennie v. Glennie*, 1 Cham. Rep. 165.

court in a reasonable time, otherwise the court will infer she has made some more beneficial arrangement. As a general rule, therefore, the court is not inclined to enforce long arrears. Alimony is allotted for the maintenance of the wife from year to year, and unless the husband is absent from this country, or some particular reasons are set forth, it would be productive of great injustice and inconvenience if after a lapse of many years, the court should enforce payment, beyond one year prior to the conviction.¹ Nor where both parties have long abstained from applying to the court, the one for a reduction of alimony, and the other to enforce regular payment, will the court enforce arrears nor inquire as to the sums paid by the husband for his wife's debts incurred by reason of non-payment of alimony.²

As to the power of arresting a husband who in order to defeat the wife of her remedy by leaving the country, provision is made by a Provincial Statute. In England the proceeding by *ne exeat* is thus described.

In order to prevent a wife being defeated of her remedy by a husband going abroad without the jurisdiction, the Court of Chancery will grant a writ of *ne exeat regno*, but this writ can only be obtained upon an affidavit that he is going abroad, or on some declaration of his that he is going; it is not sufficient to swear that another person said so.³ Nor will the writ be granted till the wife has absolutely obtained a decree for alimony, it is not enough that she has obtained a decree for separation in the ecclesiastical court.⁴ And as the writ is considered in the nature of equitable bail, it cannot be obtained except under circumstances that would entitle a party to bail at law, and consequently the Court will not in any case mark the writ for more than is actually due for the arrears and the costs, for neither Courts of law nor equity are entitled to judge whether a woman is entitled to alimony or not, or what she will ever get.⁵

The remedy of the wife is in this province more extensive, for it is provided⁶ that, "In suits for alimony, instituted after this Act

¹ *Wilson v. Wilson*, 3 Hagg. 339, n.

³ *Oldham v. Oldham*, 7 Ves. 410.

⁵ *Haffey v. Haffey*, 14 Ves. 281; and *vid.* 7 Ves. 171, 173.

⁶ 22 Vic. ch. 24, sec. 9, Con. Stat. U. C. page 373.

² *Ibid.* 322.

⁴ *Shaftoe v. Shaftoe*, 7 Ves. 171.

takes effect, (5 December, 1859), the Court or a judge therefore may, in a proper case, order a writ of arrest (*Ne exeat Provincia*) to issue at any time after the bill has been filed, and shall in the order fix the amount of the bail to be given by the defendant, in order to procure his discharge. In case an order is made for a writ of arrest, in a suit for alimony the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years besides arrears and costs, but may be for less at the discretion of the Court.¹ The bail or security required to be taken under a writ of arrest shall not be that the person arrested will not go or attempt to go out of Upper Canada, but shall merely be to the effect that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the Court may from time to time order, and will, in case he becomes liable by law to be committed to close custody, render himself, if so ordered, into the custody of any sheriff the Court may from time to time direct.²

The first application for a writ of arrest was in a suit³ in which the bill was filed October 24, 1857,⁴ for alimony, and prayed for a writ of *Ne Exeat Provincia* to issue. Defendant was possessed of £225, invested in stock, and in receipt of a salary of £100 per year. The motion was made on an affidavit verifying the facts stated in the bill, and showing the amount of defendant's property, and his intentions of leaving the Province. Spragge, V.C., granted the writ but considered it advisable to limit the amount to £200. The writ of *Ne Exeat*, granted after filing a bill in an alimony suit, remains in force after decree; but it is no objection that the wife resides out of the jurisdiction, as during coverture, the domicile of the husband is the domicile of the wife.⁵

It will be observed that by the act just referred to, it is provided that no order shall be granted for a writ of arrest unless the party applying for the writ shows by affidavit such facts and circumstances as that act requires in the case of a special order for holding a

1 22 Vic. ch. 24, sec. 10, Con. Stat. U. C.

2 Con. Stat. U. C. ch. 24, sec. 11.

3 *Cooper's Dig.* 36.

4 This proceeding was taken under 20 Vic. ch. 66, sec. 3, of which sec. 9 of Con. Stat. ch. 24, is nearly a copy.

5 *McDonald v. McDonald*, 5 U. C. L. J. 66.

party to bail under the fifth section of the Act. The practitioner therefore in framing an affidavit for a writ of arrest for alimony will be guided by the Common Law practice as to that part in which the facts are stated requisite to convince the Judge that the defendant is about to leave the Province.

Although the Statute 22 Vic., ch. 33—incorporated in sec. 10 of Con. Stat. of U. C., ch. 24—authorizes the arrest of a defendant in an alimony suit for not more than the amount of two years allowance for future alimony and arrears, still if the Court has obtained possession of funds of the defendant by reason of any default on his part, it will, in a proper case, refuse the payment of them over to him without first securing the future payment of alimony.¹

With regard to the arrears of alimony due at the death of the wife, it seems that the ecclesiastical court has the power to decree them on the application of a wife's executors, but at all events if that court has not the power, a court of equity will interfere and decree their payment; thus, where a bill by the executor of a married woman was filed for an account and payment of arrears of alimony due at her death, under a decree of the ecclesiastical court, and demurred to by the defendant, the Vice Chancellor said, that he had taken opinions, which though they were not very satisfactory, yet the better opinion was that the ecclesiastical court would allow the wife's executors to enforce payment of the arrears of alimony against the husband. If that were so, a bill in a court of equity for the same purpose was unnecessary, but added, that as it was not absolutely clear that the ecclesiastical court would in such a case decree an account and payment of arrears, he was not justified in allowing the demurrer which had been put in.²

A bill for alimony should allege that the husband has refused to receive his wife, It is not sufficient to allege merely that they are living apart.³

In order to bind the lands of the defendant the decree for alimony so soon as obtained should be registered. This is done under the

¹ *Gott v. Gott*, 10 Grant, 543.

² *Stones v. Cooke*, 7 Sim. 22.

³ *Walsh v. Walsh*, 1 Cham. Rep. 234.

provisions of 28 Vic., ch. 17, sec. 4, which enacts that an order or decree for alimony may be registered in any registry office in Upper Canada, and such registration shall, so long as the order or decree registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the county or counties where such registration is made, and operate thereon for the amount or amounts by such order or decree ordered to be paid in the same manner and with the same effect as the registration of a charge of a life annuity, created by the defendant on his lands would; and such registration may be effected through a certificate by the Registrar of the court of such order or decree.

Writ of Arrest—Setting aside.—The Court in an alimony suit on a motion to discharge the defendant from arrest under a writ of arrest, will look into the merits of the case so far as to enable it to judge whether the plaintiff had reasonable grounds to expect to succeed in her case, and in the absence of her showing such fair and reasonable grounds; or, in the event of the defendant displacing the *prima facie* case made by her on obtaining the writ, he will be discharged.

A writ of arrest had been granted on the affidavit of the plaintiff, alleging violence and ill-treatment on the part of the defendant, and showing that the defendant had advertized his stock and farming implements for sale. A motion was made to set aside this writ, and the violence and ill-treatment were denied. The plaintiff was shown to be a young robust woman,—the defendant an old man of sixty eight years, and the conduct of the plaintiff to have been violent and very immoral, and unchaste. On the denial of the defendant of any intention to leave the Province, and under the circumstances above stated, the writ was ordered to be set aside.¹

Where it is referred to the Master to allot alimony, the order is brought into his office in the usual way, and such evidence as the plaintiff can furnish as to the means of the defendant is laid before him. The proceedings are those of ordinary cases. It is usual to make the alimony payable quarterly at some particular place and between some particular hours of the day—the place designated by

¹ *Macpherson v. Macpherson*, 2 Cham. Rep. 222.

the report shall be as convenient for the parties as possible. In default of payment the plaintiff may issue execution by *fi. fa.* or by sequestration in the usual way.

There are several orders of our own Court which are to be observed. Order 488 provides that "Where the plaintiff in an alimony suit requires interim alimony, and costs, there is to be endorsed on the office copy of the bill served, or served therewith, a notice to the following effect :—*Take notice*, that the plaintiff demands as interim alimony, until the hearing of this cause, the monthly (or weekly) sum of \$. to be paid to her on the day of each month (or week), at and the costs, according to the rules of the Court." Order 489 that "No application for interim alimony, or costs, is to be made until the time for answering has expired."

Order 490 directs that "The defendant may, at any time before the answer is due, give notice in writing that he submits to pay the interim alimony, and costs, as demanded by the notice ; and in that case no order is to be taken out until there has been a default in payment ; and in case of default, affidavits being filed verifying the two notices and the default, the order is to be issued on *præcipe*." And order 491 that "The interim costs to the serving of the bill and notice inclusive, are to be \$20 ; and thence to the hearing inclusive (in a contested suit) the further sum of \$40, exclusive of mileage on serving papers and witnesses' fees ; and if the defendant pays the former sum of money to the plaintiff's solicitor on or before the day his answer is due, and the latter sum on or before the day for which the same is set down to be heard, and pays the mileage and witnesses' fees when demanded of his solicitor, no order is to be made for interim costs, except of applications to the Court."

On a question arising under 32 Vic., ch. 18, Ont., and the order 491, it was held that the plaintiff in an alimony suit is not entitled to the \$40 mentioned in the order.¹

¹ *Gibb v. Gibb*, 2 Cham. Rep. 404

CHAPTER XXXIII.

COSTS.

Costs in General.

Where the Court adjourns the further consideration of a cause, it does not usually make any order as to costs until the further hearing. Where, however, some of the defendants are, or some part of the bill, is dismissed at the hearing, or where an improper defence has been set up, the Court usually disposes of the costs of the dismissed defendants, or the costs occasioned by the dismissed part of the bill, or the improper defence, at the original hearing.¹

Where the costs are given generally by the decree, the subsequent costs will be included;² and this will be the case, although there is a reservation of "the costs of the suit not before provided for," if there are other costs which might be included under these words.³ If, therefore, the subsequent costs are not intended to be included, the direction should be confined to the costs up to the decree.⁴

The giving of costs in equity is entirely discretionary:⁵ as well with respect to the period at which the Court decides upon them, as with respect to the parties to whom they are given. It must not be supposed, however, that the Court is not governed by definite principles in its decisions relative to the costs of proceedings before it. All that is meant by the dictum, that the giving of costs in equity is entirely discretionary, is, that the Court is not, like the ordinary Courts, held inflexibly to the rule of giving the

¹ *Seton*, 57.

² *Quarrell v. Beckford*, 1 Mad. 289, 286; *Clutton v. Pardon*, T. & R. 304; *Morgan & Davey*, 66, 344.

³ *Quarrell v. Beckford*, 1 Mad. 289, 286.

⁴ *Seton*, 57. For form of such an order, see *Seton*, 56.

⁵ *Scarborough v. Burton*, 2 Atk. 111; *Bennet College v. Carey*, 3 Bro. C. C. 390; *Millington v. Fox*, 3 M. & C. 383, 362; *Remnant v. Hood*, 6 Jur. N. S. 1173, L.J.J.

costs of the suit to the successful party ; but that it will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion with reference to those points. In exercising this discretion, however, the Court does not consider the costs as a penalty or punishment ; but merely as a necessary consequence of a party having created a litigation in which he has failed ;¹ and the Court is, generally, governed by certain fixed principles which it has adopted upon the subject of costs, and does not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried.

A difference between the Courts of Law and Equity, with respect to costs, frequently arises from the nature of the property over which the latter are called upon to exercise their jurisdiction. A large proportion of suits in equity are instituted for the purpose of obtaining the administration of property ; and, in cases of that description, the practice of the Court is, not to direct the costs of the proceedings to be paid by one party to another, but to order payment of them out of the estate. The Court will also, for the purpose of affording due protection to trustees or others concerned in the administration of trust property, order the costs they have been put to, to be paid out of the trust fund which is the subject of litigation.

In considering the subject of costs, the attention of the reader will, therefore, be directed : 1st, To the rules upon which the Court acts, in awarding the costs of a suit to be paid by one party to another ; and, 2ndly, To the rules which regulate its determination, with regard to the payment of costs out of the subject-matter of the litigation. The Court of Chancery makes a distinction with regard to the principle upon which the officer of the Court is to proceed, in the taxation of costs, by allowing a larger proportion of actual expenditure to parties holding particular characters than it allows in ordinary circumstances. This distinction is marked by the terms of : “ costs as between party and party,” which are the ordinary costs allowed by the Court ; and

¹ Per Lord Cranworth, in *Clarke v. Hart*, 6 H. L. Ca. 633 : 5 Jur. N. S. 447, 453 ; see also *Worthington v. Lord Dacre*, 2 K. & J. 437, 438 ; *Purser v. Darby*, 4 K. & J. 41.

"costs as between solicitor and client," which are the costs allowed by the Court to parties filling the characters alluded to.¹ A third section, therefore, will be devoted to the consideration of the principles of taxation, for the purpose of pointing out those cases in which the Court allows the taxation of costs upon a more extended scale than the usual scale of taxation between party and party. After which will be considered : 4thly, The method of taxation, and the course to be adopted to bring the determination of questions relating to the taxation before the Court ; and, 5thly, The course to be adopted for enforcing the payment of the costs, when taxed.

In treating further of the subject of costs, in the present section, the attention of the reader will be directed to the costs only of the general proceedings in the suit : that is, to those costs which are technically termed "costs in the cause." The rules with regard to the costs of interlocutory proceedings, and other incidental matters, will generally be found, upon referring to those parts of this treatise which have been appropriated to the consideration of those matters.

Certain rules exist, with respect to the costs of interlocutory proceedings being, or not being, "costs in the cause ;" and those costs which do not come within the definition of costs in the cause, under these rules, cannot be obtained as such without the special direction of the Court.² What costs of interlocutory applications, by motion, are to be considered as "costs in the cause," may be collected from the following rules laid down by Sir John Leach, V. C., in 1823.³ These rules were the result of certain questions proposed to the Registrar, for the purpose of ascertaining in what cases the costs of a motion, where the Court gives no direction as to such costs, became "costs in the cause," to a party whose costs of suit are given upon the hearing, and are as follows : (1) That the party making a successful motion is entitled to his costs, as "costs in the cause ;"⁴ but the party opposing it is not

1 The importance of this distinction has been somewhat diminished by Ord. 307 : see *post*. Formerly, in cases of notorious frauds, the Court made the defendant pay exemplary costs ; but this practice has been disused, from the difficulty of carrying it into execution : *Waltham v. Broughton*, 2 Atk. 43.

2 *Gardner v. Marshall*, 14 Sim. 675, 588 : 9 Jur. 958 ; see, however, *Hind v. Whitmore*, 2 K. & J. 458 ; *Finden v. Stephens*, 12 Jur. 319, L.C., overruling S. C. 16 Sim. 40 : 11 Jur. 898.

3 Memorandum, 1 S. & S. 367 ; *Morgan & Davey*, 31.

4 *Hind v. Whitmore*, 2 K. & J. 458, 463.

entitled to his costs, as "costs in the cause."¹ (2) That the party making a motion which fails, is not entitled to his costs, as "costs in the cause;" but the party opposing it is entitled to his costs, as "costs in the cause."² And (3) that, where a motion is made by one party, and not opposed by the other, the costs of both parties are "costs in the cause."³ To these rules may be added a fourth, that where a bill is dismissed with costs, a defendant is entitled to his costs of unsuccessfully opposing a motion for an injunction, as "costs in the cause."⁴

Whenever, by reason of special circumstances, it is not the intention of the Court that these rules should apply, particular directions must be given with respect to the costs.

Where the costs of interlocutory proceedings are reserved, they should be reserved till the hearing of the cause, or further order, and not to the hearing, simply: because, in the latter case, no order can be made relating to them unless the cause is actually brought to a hearing.⁵

The Court will not order the payment of the costs of a cause without taxation;⁶ but our Order 304 provides that "Where the Court deems it proper to award costs to either party, it may by the Order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid. And the same may likewise be done upon such proceedings before the Court, or in Chambers, as have heretofore been matters of reference to the Master." And Order 305, that, "It shall also be competent for a Local Master upon disposing of applications made to him under Order 36, in like manner to direct payment of a sum in gross in lieu of taxed costs, and to direct by and to whom such sum in gross is to be paid."

1 18. & S. 357. If the object of the motion be in the nature of an indulgence to the party applying, he will have to pay the costs, although the motion is granted: *Browne v. Lockhart*, 10 Sim. 420.

2 S. & S. 357; see also *White v. Lisle*, 4 Madd. 214, 226. The rule applies to motions to obtain or to dissolve an injunction: *Marsack v. Reeves*, 6 Madd. 108, 109.

3 18. & S. 357.

4 *Stevens v. Keating*, 1 McN. & G. 659, 663; 14 Jur. 157; overruling S. C. 13 Jur. 974; *Finden v. Stephens*, 12 Jur. 319, L. C., overruling S. C. 16 Sim. 40; 11 Jur. 398; *Betts v. Clifford*, 1 J. & H. 74.

5 *Rumbold v. Fortesath*, 4 Jur. N. S. 608, V. C. W.; and see *Gardner v. Marshall*, 14 Sim. 675; 9 Jur. 968; *Jones v. Batten*, 10 Hare, App. 11.

6 *King v. King*, 1 Jur. N. S. 973, V. C. W.

Order 809 provides that, "The fees and disbursements set forth in the tariff annexed to these orders, may be charged in respect of the services therein enumerated."

It may here be noticed that Order 816 provides that "Where costs are awarded to be paid, it shall be competent to the taxing officer to tax the same, without an express reference to him for that purpose."

The Court does not, however, usually order a sum in gross to be paid, for the costs of interlocutory applications which are heard in open Court; unless the parties are poor, and anxious to put an end to the matter.¹ In the case of proceedings at Chambers, a sum in gross is often ordered to be paid.²

The costs of an abandoned motion are not costs in the cause; therefore, where a party gave notice of a motion, and died before the motion was heard, and the suit having been revived by his executors, who declined to proceed with the motion, the bill was subsequently dismissed with costs, and the Master, in taxing the costs, disallowed the defendants the costs of the abandoned motion, an application to the Court, for liberty to except to the Master's certificate, was refused with costs.³ It may be here mentioned, that, as a general rule, a party cannot abandon one course of proceeding and adopt another, without previously paying the costs occasioned by the abandoned proceedings.⁴

Except by consent, it is only at the hearing that a defendant can be ordered to pay the costs of the suit. The plaintiff is, therefore, entitled to bring the cause to a hearing, for the purpose of determining the question of costs; although the defendant has, in other respects, submitted to the plaintiff's demands.⁵ He

1 *London and Blackwall Railway Company v. Limehouse Board of Works*, 29 L.J. Ch. 164, V. C. W.; see however, *Yearsley v. Yearsley*, 19 Beav. 1; *Dakins v. Garratt*, 4 Jur. N. S. 570, V. C. K.; *Gower v. Stilwell*, 21 Beav. 182.

2 *Seton*, 94.

3 *Lewis v. Armstrong*, 3 M. & K. 60; see also *Farguharson v. Pitcher*, 4 Russ. 510; *Warner v. Armstrong*, 4 Sim. 140.

4 *Davey v. Durrant*, 2 De G. & J. 506; 24 Beav. 411; 4 Jur. N. S. 398. If the costs have not been taxed the party must pay a sufficient sum into Court; *Burdell v. Hay*, 33 Beav. 189; and see *Bellchamber v. Giant*, 3 Mad. 550.

5 *Fradella v. Weller*, 2 R. & M. 247, 249; *Kelly v. Hooper*, 1 Y. & C. C. C. 197, 199; *Langham v. Great Northern Railway Company*, 16 Sim. 173; *Burgess v. Hills*, 26 Beav. 244; 5 Jur. N. S. 283; *Burgess v. Hateley*, 26 Beav. 249; *M'Naughtan v. Hasker*, 12 Jur. 956, V. C. K. B.; *Collins v. Morgan v. Walker*, 7 W. R. 222, V. C. K.; *Wilde v. Wilde*, 10 W. R. 608, L.J.J.; *Morgan v. Great Eastern Railway Company*, 1 H. & M. 79; *M'Andrew v. Bassett*, 10 Jur. N. S. 492, V. C. W.; contra, *Stell v. Abraham*, 8 Beav. 598; *Whalley v. Lord Sufiled*, 12 Beav. 402; *Hennet v. Luard*, ib. 479, 480; *North v. Great Northern Railway Company*, 2 Giff. 64; 6 Jur. N. S. 244.

should, however, in such a case, first apply to the defendant for his consent to have the question of costs disposed of, on motion,¹ or petition.² Where, however, the question in dispute has been settled by compromise out of Court, without providing for the costs of the suit, the Court will not permit the cause to be brought to a hearing, merely for the purpose of disposing of the costs.³

Where a plaintiff filed a bill for an injunction and payment of damages, and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced: *Held*, that the Court had not jurisdiction to make a decree for the damages. The defendant having neglected to inform the plaintiff of the discontinuance, though applied to respecting it before suit, the bill was dismissed without costs.⁴ Where the defendant submitted by answer, to be redeemed as payment of costs, and made statements, which, if true, would have entitled him to costs: *Held*, that the plaintiff was justified in going to a hearing for the purpose of proving facts which entitled him to costs against the defendant.⁵ The rule of this Court, that when the subject matter of a suit is settled by defendant before the decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits. A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be relieved from costs. Where, under such circumstances the Referee refused an application by plaintiff, for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs. Where a bill had been filed as a mortgage, on which only a small sum for interest had become due two days previously, and the defendant's solicitor had called at the plaintiff's solicitor's office, and left word that he was ready to pay the money; the Court refused the plaintiff his costs, and *held* that the bill was unnecessarily and improperly filed. Local Masters and Deputy Registrars of the Court are not at liberty to practice in partnership with solicitors practising in the Court, although

¹ *Forgan v. Great Eastern Railway Company*, 1 H. & M. 78.

² *Tompson v. Knights*, 7 Jur. N. S. 704; 9 W. R. 780, V. C. W.

³ *Roberts v. Roberts*, 1 S. & S. 39; *Gibson v. Lord Cranley*, 6 Mad. 365; *Whalley v. Sugfield*, 12 Beav. 402.

⁴ *Brockington v. Palmer*, 18 Grant 486.

⁵ *Brand v. Martin*, 16 Grant 556.

they may not actually share in the emolument of suits.¹ It may here be noticed that the necessity for serving the defendant out of the jurisdiction is sufficient to entitle the plaintiff to full costs.²

An answer may be read by the defendant upon the question of costs, although it cannot, where replication has been filed, (except by consent,) be read as evidence on his own behalf, upon the matter in dispute between him and the plaintiff.³ The Court will frequently, although compelled by the evidence read in the cause to decree against a defendant, give credit to his own statement, contained in his answer upon oath, as to his conduct, and make the decree against him without costs.⁴

Costs from one Party to another.

It was the rule of the Civil Law, that *victus victori in expensis condemnatus est*.⁵ This is the general rule adopted by the Court of Chancery ; and the unsuccessful party must show the existence of circumstances sufficient to displace the *prima facie* claim to costs given by success to the party who prevails.⁶

If, however, the unsuccessful party can show to the Court any circumstances which may satisfy it that it would be against the ordinary principles of justice that he should pay the costs of the proceeding, he will be permitted to do so ; and the Court will even, under certain circumstances, not only excuse the unsuccessful party from the payment of costs to his opponent, but will actually throw his costs upon the party succeeding. Cases of the latter kind, however, are very limited.

The general rule which gives the costs of the suit to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in

¹ *McLean v. Cross*, 3 Cham. Rep. 437.

² *Per Strong v. C. Skelly v. Skelly*, 18 Grant 496.

³ *Vancouver v. Bliss*, 11 Ves. 458, 464 ; *Howell v. George*, 1 Madd. 13.

⁴ *Millington v. Fox*, 3 M. & C. 338, 351.

⁵ Cod. 3, 1, 13.

⁶ *Vancouver v. Bliss*, 11 Ves. 458, 463 ; *Staines v. Morris*, 1 V. & B. 8, 16 ; *Millington v. Fox*, 3 M. & C. 338, 353 ; *Colburn v. Simms*, 2 Hare, 543, 562 ; 7 Jur. 1104 ; *Earl Nelson v. Lord Bridport*, 10 Beav. 305 ; *Bartlett v. Wood*, 9 W. R. 817. L. O. : *Edelsten v. Edelsten*, 1 De G. J. & S. 185 ; 9 Jur. N. S. 479.

autre droit, and to those in which they are *sui juris*. Therefore, executors, administrators, trustees, or assignees in bankruptcy,¹ instituting or defending suits against strangers to their trusts in those capacities, are subject to the same rules, as to costs, as they would be if they were suing or defending in their own right;² thus, an executor or administrator instituting a suit against a debtor to his testator's or intestate's estate, as he will, if he succeeds, be entitled, under the general rule, to the costs of his suit from the debtor, so, if he fails, he must pay the costs of his adversary.³ In like manner, a trustee for sale, filing a bill against a purchaser for a specific performance of his agreement, is liable to pay or receive costs from his adversary, in the same manner as a person instituting or defending such a suit in his own right.⁴ The question whether a party who sues or defends in *autre droit*, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will be referred to hereafter, when we come to treat of cases in which costs are payable out of the fund which is the subject of litigation.

In litigating with third parties, executors are with respect to costs in the same position as parties who litigate in their own right.⁵

There are, however, certain cases, arising from the character sustained by the party, in which the Court generally gives the costs to that party, whatever may be the result of the suit. One of these cases is, where an heir at law is made a party to a suit for the purpose of establishing a claim against real estate; it being the almost invariable rule of the Court to give the heir at law his costs of such a proceeding. In this respect, the heir is more favoured than executors. "Executors," says Lord Hardwicke, "shall not have costs; because they may renounce; but it is the Law which casts the descent upon the heir, and that differs his case from the executor's; and if he has accounted, justly, for such money as is come to his hands, it certainly entitles him to his

¹ *Morris v. Cannan*, 10 W. R. 589, L. C.; but where the defendant became bankrupt during the suit, and the assignee continued the defence, the latter was only held liable for the costs to the bankruptcy: *Foxwell v. Greatorex*, 33 Beav. 345.

² See *Morgan & Davey*, 288, *et seq.*
⁴ *Edwards v. Harvey*, G. Coop. 40.

³ *Westley v. Williamson*, 2 Moll 458.

⁵ *G. W. R. Co. v. Jones*, 13 Grant 355.

costs."¹ Where the claim will wholly exhaust the estate, the heir is entitled to his costs as between solicitor and client; because he is, in that case, a trustee for the claimant; but under other circumstances, he is only entitled to his costs as between party and party.² So, where an heir at law is made party to a suit, for the purpose of proving a will against him, he will be entitled to his costs;³ and he will not forfeit this right by cross-examining the plaintiff's witnesses.⁴ So, also, where an heir at law is brought before the Court in the case of a charity, he will be entitled to his costs; and, in general, if he makes no improper point, he will be awarded them as between solicitor and client.⁵ And in a charity case, where an heir at law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client; although the Court was, upon the hearing, of opinion that there was no resulting trust in his favour.⁶

The rule, that an heir at law is entitled to his costs, is not, however, without exceptions. Thus, where an heir set up a claim to property as undisposed of under the will and failed, he was refused his costs;⁷ and, where the object of the bill is merely to perpetuate the testimony of the witnesses to the will, if the heir examines witnesses of his own in chief he will not be allowed his costs of so doing.⁸ This, however, is only where the bill does not pray relief, or is not one of a nature which is brought to a hearing; where the cause is one which may be brought to a hearing more latitude is allowed;⁹ and if he chooses to examine witnesses himself, the question of costs will depend upon the circumstances; he is also indulged further, for he has a right to require the validity of the will to be tried as a question of fact,¹⁰ and is entitled to the costs of the trial, even though the verdict is against him, and the will is established,¹¹ unless there are any peculiar circum-

1 *Humphrey v. Morse*, 2 Atk. 408; *Popple v. Henson*, 5 De G. & S. 318.

2 *Tardrew v. Howell*, 2 Giff. 530; 7 Jur. N. S. 387; *Shittler v. Shittler*, 4 N. R. 475, M. R.; see, however, *Festing v. Allen*, 5 Hare, 567, 570.

3 *Crew v. Joliff*, Proc. in Ch. 98; *Luxton v. Stephens*, 3 P. Wms. 273.

4 *Bidulph v. Bidulph*, 2 P. Wms. 235.

5 *Currie v. Pye*, 17 Ves. 462, 468; but see *Whicker v. Hume*, 14 Beav. 523, where the costs were only allowed as between party and party.

6 *Attorney-General v. Haberdashers' Company*, 4 Bro. C. C. 178; S. C. nom. *Attorney-General v. Tonna*, Beames on Costs, App. No. 13; and see *James v. James*, 11 Beav. 397.

7 *Rashley v. Masters*, 1 Ves. J. 205.

8 *Berney v. Byre*, 3 Atk. 387; see *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 215.

9 *Berney v. Byre*, 3 Atk. 387.

10 *White v. Wilson*, 13 Ves. 87; but see *Man v. Ricketts*, 7 Beav. 93; S. C. nom. *Ricketts v. Turquand*, 1 H. L. Ca. 473.

11 *White v. Wilson*, 13 Ves. 87; *Berney v. Byre*, *ubi sup.*; *Webb v. Claverdon*, 2 Atk. 424; but see *Tutkhill v. Scott*, 2 Moll. 468; *Tucker v. Tucker*, 1 M'L. & Y. 425; 13 Pri. 609; *Newton v. Lucas*, 1 M. & C. 391; 392.

stances in the case which may induce the Court to refuse them. Thus, where one of the witnesses did not clearly prove the execution of the will, and the heir asked for an issue, on the trial of which the will was found to have been duly executed ; upon the case coming on for further directions the heir asked for his costs, both at Law and in Equity, and they were given him by the Court.¹

Amongst the peculiar circumstances which will induce the Court to refuse costs to an heir, may be mentioned his attempting to set up insanity, or any other disability, against the person who made the will.² And a defendant, brought before the Court as heir, was deprived of his costs, both at Law and in Equity, because he had thought proper to state in his answer to the original bill that he was heir at law to the testator, and to dispute the will ; although he knew, as he admitted in his answer to the supplemental bill, that his elder brother had left children.³ And where a defendant, heiress at law, asked for an issue, with notice of circumstances which rendered her success improbable, she was, although the will was open to great and grave suspicion, held not entitled to the costs of the issue.⁴

Where, also, an heir at law unnecessarily filed a cross bill, for the purpose of establishing his claim to certain legacies to charities which the testator had charged upon real estate, the whole benefit of which he might have had under the original bill, Lord Thurlow gave the costs of the cross bill out of the real estate ; which, in effect, fixed them upon the heir.⁵

But although, where an heir is brought before the Court as a defendant, he may, under the circumstances suggested, be deprived of his costs, yet the Court will not give costs against him, even though he should insist upon the will's being fraudulent, or the testator being insane, and upon the question of fraud or insanity being tried, he fails in the attempt to overturn the will.⁶ It must be a very strong case which will induce the Court to give

¹ *Wright v. Wright* 5 Blm. 449.

² *Berney v. Byre*, 3 Atk. 387 ; *Grove v. Young*, 5 De G. S. 38, 42 ; 15 Jur. 1099.

³ *Roberts v. Scoones*, 7 Blm. 418, 421 ; and see *Burns v. Breen*, 1 B. & B. 308.

⁴ *Stacey v. Spratley*, 4 De G. & J. 199 ; 5 Jur. N. S. 508.

⁵ *Leacroft v. Maynard*, 1 Ves. J. 279 ; and see *Beames on Costs*, 68.

⁶ *Webb v. Claverdon* 2 Atk. 424 ; *Smith v. Dearner*, 3 Y. & J. 378 ; *Roberts v. Kerslake*, 1 K. & J. 751.

costs against the heir : such as spoliation or secreting the will ;¹ or where he vexatiously contests the will, by setting up a case of insanity, knowing the devisor to be perfectly sane ;² or where he refuses to convey to a purchaser, under a contract entered into by his ancestor.³

The general rule is, that in suits for specific performance against the infant heirs of vendors, the decree should be without costs.⁴

The heir at law is entitled to his costs, as a matter of course, in those cases only in which he comes before the Court as a defendant. Where he assumes the character of a plaintiff, and seeks to impeach a will on the ground of insanity, or upon any other ground upon which he might impeach it by ejectment at Law, he will, if unsuccessful, be ordered to pay the costs⁵ and this, even though he is an infant : "because he may, notwithstanding, bring a bill on coming of age, or ejectment ; indeed, it is not certain whether another *prochein amy* may not bring a bill."⁶ It is only, however, in cases in which the heir might have proceeded at Law that he will be liable to costs if his bill be dismissed : where that is not the case, he will not be compelled to pay the costs. The Court, in fact, considers that an heir at law, contending for his inheritance upon fair grounds, ought not to pay the costs, though he does not succeed in establishing his right ; and, therefore, where the testator, previously to making his will, conveyed his estate to a trustee, upon trust to convey it as he, the testator, should direct by his will, and the heir filed a bill to impeach the will, which was dismissed, Sir John Leach, M. R., determined that, as the circumstance of the trust rendered it necessary for the heir to come into equity, the dismissal should be without costs : although he ordered the heir to pay the costs of an issue, which had been directed, and in which he had failed.⁷

1 *Berney v. Eyre*, 3 Atk. 387 ; *Middleton v. Middleton*, 5 De G. & S. 666 ; *Williams v. Williams*, 33 Beav. 806 ; *Cougill v. Rhodes*, *ib.* 310, 314 ; and see *Marriott v. Marriott*, 12 W. R. 308, V. C. W.

2 *White v. Wilson*, 13 Ves. 87, 92. 3 *Hoddel v. Pugh*, 33 Beav. 489.

4 *Commander v. Gilrie*, 6 Grant 473.

5 *Webb v. Claverden*, 2 Atk. 424 ; *Seal v. Brounion*, 3 Bro. C. C. 214 ; *Johnson v. Gardiner*, 1 Dick. 313 ; *Swinfen v. Swinfen*, 27 Beav. 148, 167.

6 *Blinkehorne v. Feast*, 1 Dick. 153.

7 *Scrafe v. Scrafe*, 4 Russ. 309 ; see also *Tatham v. Wright*, 2 R. & M. 1, 32. It seems, from some early cases, to have been the doctrine of the Court, that an heir at law, or heir male of the honour of a family, has a right to come into equity for a production and inspection of the deeds by which he is disinherited ; and that, if he does so, he will not be liable to costs ; see *Leman v. Atie*, Amb. 163 ; *Harrison v. Southcote*, 2 Ves. S. 389, 396 : 1 Atk. 539 ; *Earl of Suffolk v. Howard*, 2 P. Wms. 177 ; *Shales v. Barrington*, 1 P. Wms. 481.

Another case in which the Court generally gives costs to the party, without reference to his success in the suit, is that of a mortgagee or other incumbrancer having a specific lien upon property: the principle of the Court being, that where the owner comes to deliver the estate from the incumbrance which he himself, or those under whom he claims, have put upon it, the person having that pledge is not to be put to expense with regard to that proceeding; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified.¹ This principle was formerly applied, also, to those cases in which, although the transaction between the parties did not originally consist in borrowing or lending money, or charging an estate with a particular sum, the Court thought proper to consider a party advancing money in the light of a mortgagee or incumbrancer. The cases to which allusion is made are those in which the Court orders securities to be delivered up, or sales of reversionary interests to be set aside, because the bargain has been unconscientious: in these cases, the Court generally decrees for the plaintiff, upon terms that he shall repay the defendant the amount actually advanced or paid by him, with interest; and, looking upon him as a mortgagee for that amount, it formerly treated him as such, by ordering the plaintiff to pay him his costs.² The Court now, however, considers cases of this description to be analagous to redemption suits, where the mortgagee resists the right to redeem; and no costs are given on either side;³ but if the defendant has refused to accept terms which were better than those to which the Court considers him entitled, he will be ordered to pay the cost of the suit.⁴

A mortgagee is always entitled to his costs, and, therefore, when a subsequent mortgagee who has filed a bill to foreclose offers to consolidate his suit with that of the prior mortgagee who has filed a bill after him, he will be allowed his prior costs in such suit.⁵

1 *Detillin v. Gale*, 7 Ves. 583; *Loftus v. Swift*, 2 Sch. & Lef. 643, 667; *Taylor v. Baker*, Dan 71 and see *Fisher*, 564, et seq.; *Morgan & Davey*, 165, et seq.; *Seton* 376, et seq.

2 *Peacock v. Evans*, 16 Ves. 512; *Gowland v. De Faria*, 17 Ves. 20, 28; *Boose v. Heaps*, 3 V. & B. 117, 121; and see *Priestly v. Wilkinson*, 1 Ves. J. 214.

3 *Salter v. Bradshaw*, 26 Beav. 161; 5 Jur. N. S. 831; *Bromley v. Smith*, 26 Beav. 644; 5 Jur. N. S. 833; *St. Albyn v. Harding*, 27 Beav. 11; *Foster v. Roberts*, 29 Beav. 467; *Talbot v. Stanforth*, 1 J. & H. 484.

4 *Emmet v. Tottenham*, 10 Jur. N. S. 1090; *S. C. nom Tottenham v. Emmet*, 13 W. R. 123, M. R.; and see *Berdoc v. Dawson*, 11 Jur. N. S. 254; 13 W. R. 420, M. R.

5 *Allan v. McDougald*, 6 U. C. L. J. 64.

At Law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; he may sell it, or encumber it, or devise it. If, therefore, the mortgagor applies to a Court of Equity for redemption, it is only granted to him upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts: thus, a mortgagor, filing a bill to redeem, must pay the costs, not only of the mortgagee himself, but of all persons claiming under him.¹ The same rule applies to a foreclosure, as well as a redemption suit; and, in general, it makes no difference whether the bill is filed by the mortgagor to redeem, or by the mortgagee to foreclose: in either case, the mortgagee is entitled to his principal, interest, and costs. Thus, where a mortgagee assigned his mortgage money to the trustee of his marriage settlement, and afterwards filed a bill of foreclosure against the mortgagor, to which the trustee was made a party, he was ordered to pay the costs of the trustee, and to add them to the mortgage debt.² Where, however, a second mortgagee filed his bill to redeem the first, and foreclose subsequent mortgages, and the estate was not sufficient to pay the first mortgage, the bill was dismissed, with costs as against the first mortgagee, and without costs as against the other defendants.³

A mortgagee will not only be allowed his own costs, and the costs of those claiming under him, but he will be allowed, as against the estate, all costs which he may have incurred in asserting or defending his title to the estate. Thus, where a mortgagee had filed a bill of foreclosure, he was allowed the costs he had incurred in procuring administration to an annuitant under the will of the mortgagor: such annuitant being a necessary party to the foreclosure.⁴ So, where an infant, claiming under a mortgagor, had endeavoured to defeat the mortgage by setting up a supposed entail, and after a special verdict, and great litigation at Law, the mortgagee prevailed, whereupon the infant brought his bill to redeem, and the mortgagee swore that he had expended above 120*l.* in defending his mortgage at Law: although he had but 60*l.*

¹ *Wetherell v. Collins*, 3 Madd. 255; *Coles v. Forrest*, 10 Beav. 552, 555. As to costs in suit by pauper, see *Batchelor v. Middleton*, 6 Hare, 86.

² *Bartle v. Wilkin*, 8 Sim. 238. As to the costs of the solicitor to the suitor's fee fund, as guardian for an infant defendant, in a foreclosure suit, see *Harris v. Hamlyn*, 14 Jur. 55, V. C. K. R.

³ *Gibson v. Nicol*, 9 Beav. 403, 407.

⁴ *Hunt v. Fowkes*, 9 Ves. 70.

costs allowed him there, it was held that he should not be confined to his taxation at Law, but should, upon the account, be allowed all he had laid out or expended; and it appearing that the mortgagee, fearing his mortgage would have been defeated at Law, got administration as creditor in the Ecclesiastical Court, he was allowed his costs expended there also.¹

And so, in another case, where a first mortgagee, after he had been put to great expense in suits to foreclose, and otherwise in respect to the estate, had a bill filed against him by a second mortgagee to redeem, the Court ordered that his costs should not be taxed as in an adverse suit, but that he should be allowed all his costs and expenses, as is done in the case of a solicitor who lays out and disburses money for his client: the rents to be applied, in the first place, to pay such costs, before they were applied to sink the principal.² And on a bill for redemption, Sir John Leach, M. R., gave to the mortgagee the costs of an action, which he had brought against a person who had joined the mortgagor as surety, in a bond for the mortgage money: the fruit of the action being lost by the insolvency of the surety: and his Honor stated the principle to be, that the mortgagee was entitled to be allowed,³ in account, against the mortgagor, all expenses properly incurred for the recovery of the mortgage money.³

All extra costs and expenses should, however, be asked by the bill, and mentioned in the decree.⁴

Upon the same principle, it is stated that, if a mortgagee or real creditor is brought before the Court to have his security impeached, and the bill is dismissed, there is hardly an instance in which it is not with costs: for, being brought before the Court without just grounds, the Court would not do him justice, unless costs were given to him, as he is a creditor and incumbrancer.⁵ In *Brodie v. St. Paul*,⁶ however, where certain mortgagees and trustees were brought before the Court upon a bill for specific performance of

1 *Ramsden v. Langley*, 2 Vern. 536: 1 Eq. Ca. Ab. 328, 329, pl. 5. But an equitable mortgagee will not be entitled to the costs incurred at law in unsuccessfully defending his possession: *Dryden v. Frost*, 3 M. & C. 670, 676.

2 *Lomax v. Hyde*, 2 Vern. 185: *Ainsworth v. Roe*, 14 Jur. 374, M. R.

3 *Ellison v. Wright*, 3 Russ. 468: *Peers v. Ceeley*, 15 Beav. 200.

4 *Seton*, 381. For forms of orders as to such extra costs and expenses, see *ib.* 390.

5 Per Lord Hardwicke, in *Tuner v. Ivis*, 3 Ves. 8. 466, 468.

6 1 Ves. J. 326, 334.

an agreement for a lease, not for the purpose of impeaching their title, but as necessary parties to confirm the lease, and the bill was dismissed against the principal party without costs, on account of the hardship of the case, the mortgagees and trustees were refused their costs : Mr. Justice Buller, who heard the cause, saying, that if the decree had been for the plaintiff, perhaps he might have given the trustees their costs, because he could have given them over against the other defendants ; but that, as it was, they must have their remedy against their principal.

The rule, that the mortgagor is to pay the costs of the mortgagee, and of those made necessary parties by his act, does not apply where the title to the mortgage is disputed ; and, in that case, the mortgagee's costs should only be borne by the estate, as against the persons interested in the equity of redemption, when they have concurred or assisted in the litigation.¹ Upon this principle, where the plaintiff was devisee of a mortgagee, and filed his bill against the mortgagor for a foreclosure, making the heir at law of the mortgagee a party, in order to have the will established against him, Lord Kenyon, M. R., thought the estate ought not to be burdened with his costs.² So, where the mortgagee, after bill of foreclosure filed, became insolvent, the costs of his assignee, made a defendant, were not thrown on the mortgaged estate.³ And, in general, if a mortgagee, after a decree to account, assigns his interest to another, the costs of the proceedings necessary to bring the assignee before the Court must be paid by the mortgagee.⁴

In these cases, the costs given to a mortgagee are scarcely in the nature of costs in the cause : they are rather sums that the mortgagee has a right to be paid, before the relief asked for against him can be granted.

The rule, that a mortgagee is to have his costs paid, is subject to an exception in cases where he is a lunatic. In such cases, the costs of the committee of a lunatic mortgagee, requisite to enable

¹ *Parker v. Watkins*, 1 Johns. 183 ; and see *Pelly v. Wathen*, 7 Hare, 372 : 14 Jur. 9.

² *Stipp v. Wyatt*, 1 Cox, 353.

³ *Eorum v. Woolingham*, 1 Beat. 1.

⁴ *Barry v. Wrey*, 3 Russ. 465.

him to convey to the mortgagor under the statute, are to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage money, and the application is made by the committee.¹ Where it clearly appears, on the face of the mortgage deed, that the lunatic mortgagee is only a trustee, the mortgagor must bear the costs;² but this will not be ordered, where the trust does not appear on the deed.³ If the mortgagor applies, he must pay the costs of obtaining the order, unless the committee has declined to apply for it.⁴

The right of a mortgagee or incumbrancer to his costs will prevail, in cases in which the Court directs a sale of the property pledged; and the mortgagee is entitled to the payment of his costs, before the subsequent mortgagees receive any part of their principal, interest, or costs: the practice of the Court being to direct each mortgagee to be paid his principal, interest, and costs, according to his priority;⁵ but it has been held, that where a mortgagee commences or adopts a suit for the administration and sale of the mortgagor's estate, he does not rest exclusively on his contract, but seeks something beyond it; and the costs of the suit are the first charge, if the estate prove deficient.⁶ It has also been held, that an equitable mortgagee, by filing a bill for the sale of the mortgaged property, and the payment of the balance out of the general assets, and for administration, does not render the proceeds of the mortgaged estate liable to the costs of the suit, in priority to the plaintiff's claim.⁷

Where the suit is instituted by a subsequent incumbrancer, to ascertain priorities, making a prior mortgagee or incumbrancer a party, the subsequent incumbrancer ought to offer by his bill to

1 *Ex parte Richards*, 1 J. & W. 264; *Re Wheeler*, 1 De G. M. & G. 434; *Re Viall*, 8 De G. M. & G. 439; *contra*, *Re Marrow*, C. & P. 142; *Re Biddle*, 23 L. J. Ch. 23, L.J.J.; *Morgan & Davey*, 171.

2 *Re Leves*, 1 McN. & G. 23.

3 *Re Townsend*, 2 Phill. 348; 1 McN. & G. 636.

4 *Re Stuart*, 4 De G. & J. 317; *Re Jones*, 2 De G. F. & J. 554; 7 Jur. N. S. 115.

5 *Belchier v. Butler*, 1 Eden, 523; *Upperton v. Harrison*, 7 Sim. 444; *Barnes v. Racster*, 1 Y. & C. C. 401, 407; 6 Jur. 595; *Hepworth v. Heslop*, 3 Hare, 485, 487; 9 Jur 796; *Wilde v. Lockhart*, 10 Beav. 320, 323; *Carr v. Henderson*, 11 Beav. 415; *Cutfield v. Richards*, 26 Beav. 241; *Croese v. General Reversionary Company*, 3 De G. M. & G. 698; *Langton v. Langton*, 7 De G. M. & G. 30; 1 Jur. N. S. 1078; and see *Berry v. Hebblethwaite*, 4 K. & J. 80; see also *Seton*, 298, 379; *contra*, *Kenel v. Scrafton*, 13 Ves. 370.

6 *Armstrong v. Storer*, 14 Beav. 535; *White v. Gudgeon*, 30 Beav. 545; *Dighton v. Withers*, 31 Beav. 423; *Seton*, 293, 379; but see Judgment of L. J. Turner, in *Ward v. Mackinlay*, 10 Jur. N. S. 1063, 1064; 13 W. R. 65; see also *Aldridge v. Westbrook*, 5 Beav. 188, 193.

7 *Tipping v. Power*, 1 Hare, 405, 407; 6 Jur. 434; *Wade v. Ward*, 4 Drew. 602; and it seems that according to V. C. Wood, the same rule applies to a legal mortgage; *Seton*, 298, 380; *Berry v. Hebblethwaite*, 4 K. & J. 80; *Tuckley v. Thompson*, 1 J. & H. 126.

redeem the prior incumbrancer; and, if he omits to do so, the prior incumbrancer has a right to insist upon being dismissed with costs. But if the prior incumbrancer, instead of asking to be dismissed, consents to a sale, and to take his principal and interest out of the proceeds, he must, as he thereby adopts the suit and takes the benefit of it, contribute to the costs of it: therefore, the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.¹ Where, however, the property had been preserved by the diligence of the plaintiff, a *puisne* incumbrancer, his costs were first provided for; and the costs of the other incumbrancers were directed to be added to their securities, and paid according to their priorities.²

A bill for sale was filed by a *puisne* incumbrancer, and prior incumbrancers and mortgagees were made parties in the Master's office, and a decree on further directions made for payment according to priority. The proceeds of a sale proved insufficient to pay the first incumbrancer. An application on part of the plaintiff to have his costs of suit and of sale paid out of such proceeds in preference to the first incumbrancer was refused with costs.³

The rule above laid down, that a mortgagee or incumbrancer is entitled to his costs, as well as to his principal and interest, is liable to exception, also, in cases in which the Court considers him guilty of any misconduct with reference to the suit, or the subject of it. In *Detillin v. Gale*,⁴ Lord Eldon said: "Though a mortgagee, acting reasonably as such, is to have his reasonable expenses, it does not follow that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts which, upon his part, are not only unreasonable but grossly oppressive." In that case, the mortgagee was deprived of his costs of that part of the suit where he had been guilty of improper conduct. So, where a mortgagee sets up an unfounded claim,⁵ or an unjust defence, insisting on his deed as an absolute purchase, he

1 *White v. Bishop of Peterborough*, Jac. 402; see also *Brace v. Duchess of Marlborough*, Mos. 50; *Seton*, 330.

2 *Ford v. Earl of Chesterfield*, 21 Beav. 426; *Wright v. Kirby*, 23 Beav. 463.

3 *Grange v. Barber*, 2 Cham. Rep. 180.

4 7 Ves. 553, 555; and see *— v. Trecothick*, 2 V. & B. 181; *Lafus v. Swift*, 2 Sch. & Lef. 642, 657.

5 *Montgomery v. Calland*, 14 Sim. 79, 81.

will be deprived of his costs.¹ And from the case of *Smith v. Green*² it appears that, if a first mortgagee receives from a second mortgagee a tender of all that is due for principal, interest, and costs, the first mortgagee will not be entitled to the costs of a foreclosure suit after the tender. Nor will he be allowed his costs in a redemption suit, if he has not been ready with and offered to show his accounts.³

In answer to a bill for the redemption of a mortgage, alleging the existence of usury in the original transaction, the mortgagee set up several defences which were decided against him, the Court in decreeing redemption, ordered the plaintiff to pay such costs as would have been incurred in a common redemption suit, and the defendant to pay the costs of the issues found against him.⁴ In a suit to redeem the plaintiff alleged several grounds for relief, which he failed to establish, although he succeeded in shewing a right to redeem, which right the defendant had contested: the Court, under the circumstances, refused costs to either party up to the hearing, and gave the defendant the subsequent costs of a redemption suit, where the right to redeem was admitted.⁵

In *Detillin v. Gale*, before referred to, Lord Eldon appears to have expressed an opinion, not only that a mortgagee might be deprived of his costs, but that, under some circumstances, he might be called upon to pay costs. He there said: "It is said it will be an extremely bad precedent to hold, that in no case a mortgagee can be called upon to pay the costs of the mortgagor. I will not say the Court will not, and am very far from saying the Court ought not, to make that precedent; but it ought to be made upon very great consideration."⁶ His Lordship afterwards referred to the case of *Shuttleworth v. Lowther*,⁷ in which Lord Lonsdale, a mortgagee, was made to pay costs (on the ground of a tender, and an appropriation of the money: which was paid into a bank and refused), as affording an instance in which a mortgagee had been

¹ *Franklyn v. Fern*, Barnard. 30; see also *Sevier v. Greenway*, 19 Ves. 413, 415; *Kirkham v. Smith*, 1 Ves. 8, 258, 262; *Wheaton v. Graham*, 24 Beav. 483; *Re Unsworth*, 13 W. R. 443, V. C. K.

² 1 Coll. 565; see also *Williams v. Sorrell*, 4 Ves. 380.

³ *Powell v. Trotter*, 1 Dr. & Sm. 383.

⁵ *Boncell v. Gravelley*, 16 Grant 523.

⁴ *Lusherwood v. Dizon*, 5 Grant 314.

⁶ 7 Ves. 583, 586.

⁷ Cited *ib.*; and see *Roberts v. Williams*, 4 Hare, 129, 131; *Emmet v. Tottenham*, 10 Jur. N. S. 1090; *S. C. nom. Tottenham v. Emmet*, 13 W. R. 123, M. R.; *Hoekin v. Sinoock*, 11 Jur. N. S. 477; 13 W. R. 487, V. C. K.

made to pay the costs; and there are other cases in the books which may be cited in support of the same proposition. Thus, in *Mocatta v. Murgatroyd*,¹ the mortgagee was ordered to pay costs to the plaintiffs, who were indorsees of subsequent mortgages or bills of sale of a ship; but he was not to have his costs over, against the first mortgagor: Lord Cowper saying, that it was not reasonable that he should onerate his pledge with costs occasioned by his unjust defence;² and this principle has been acted upon in *Harvey v. Tebbutt*,³ where a mortgagee, who had resisted the right to redemption, by setting up a decree of foreclosure collusively obtained, was decreed to pay so much of the costs as was occasioned by his resistance.

A mortgagee having omitted to give credit on the deed, or in his books, for sums of money paid to him by the mortgagor, his executors, after his decease, claimed a large sum to be due on the foot of the mortgage. The mortgagor tendered a certain amount, saying, at the same time, that he was willing to pay any additional sum that might appear due, after giving him credit for the sums alleged to have been paid. A bill was afterwards filed by the representatives of the mortgagee to foreclose, and on taking the account, a sum of between £2 and £3 over and above the amount tendered, was found to be due. The Court, under the circumstances, ordered the plaintiff to pay the costs.⁴ Where a mortgage debt has been reduced to a sum of about £1 14s., the mortgagee, who had taken an absolute deed, distrained for £40, claiming that amount to be due, the Court, upon a bill filed by the mortgagor to redeem, refused the mortgagee his costs.⁵

Where a mortgagee, by a bill of foreclosure, attempted to tack a bond to a mortgage as against creditors, the bill was to that extent dismissed with costs;⁶ and where the difficulty in a foreclosure suit was occasioned by the loss of the mortgage deed, the mortgagee was ordered to pay the costs;⁷ and a similar order was made, where a

1 1 P. Wms. 393, 396.

2 See also *Baker v. Wind*, 1 Ves. 8. 160; *England v. Codrington*, 1 Eden, 169, 174; *Lord Cranston v. Johnston*, 5 Ves. 277, 279; *Taylor v. Baker*, Dan. 71.

3 1 J. & W. 197, 202.

4 *Cornwall v. Brown*, 3 Grant 638.

5 *Long v. Glen*, 5 Grant 208; and see *Mossop v. T. & L. Co.*, 11 Grant 204.

6 *Hamerton v. Rogers*, 1 Ves. J. 513.

7 *Stokoe v. Robson*, 19 Ves. 385; and for the order, see *Seton*, 620, No. 1.

redemption suit was rendered necessary by the mortgagee having lost the title-deeds.¹

A party in possession of land under an agreement in the nature of a Welch mortgage, having refused to give any statements of rents received, or information as to the amount due, a bill was filed by the mortgagor for an account. Notwithstanding that on taking the account between the parties, a balance was found to be still due to the defendant, the Court ordered him to pay the costs of the suit.² A mortgagee who takes a deed absolute in form, instead of with a defeazance, and then fraudulently denies the right of redemption, setting up the deed as constituting an absolute purchase, is guilty of such misconduct as will subject him to the payment of the costs of the suit.³

But although a mortgagee may, under peculiar circumstances, not only be deprived of his costs but be ordered to pay them, there must be positive misconduct on his part to bring such a visitation upon him.⁴ The mere circumstances that he has extended his claim beyond what the Court finally decides he is entitled to, will not be a ground for refusing him his costs ;⁵ and, although he may have suggested a doubt as to the mortgagor's title to redeem, yet, if the Court thinks there is sufficient ground for entertaining such doubt, he will not be charged with the costs, even where his doubt eventually proves unfounded. Thus, where, on a bill by a devisee to redeem, the mortgagee insisted that the heir of the mortgagor was alive, and an issue was directed to try whether he was living or dead, upon the trial of which the jury found that he was dead, Sir John Leach, V. C., determined that the mortgagee must not pay the costs of the issue, as he could not be charged with vexation in a case where the Court thought there was so much weight in his objection as to direct an issue.⁶

The right of a mortgagee to his costs is not defeated by the circumstance of his having remained in possession of the estate after the rents and profits received by him have been sufficient to pay

1 *Lord Middleton v. Eliot*, 15 Sim. 531 ; and for the order, see *Seton*, 629, No. 2.

2 *Morrison v. Nevins*, 5 Grant, 577.

3 *Letarge v. Le Tyele*, 3 Grant, 506.

4 *Loftus v. Swift*, 2 Sch. & Lef. 642, 657.

5 *Ibid.* ; *Norton v. Cooper*, 5 De G. M. & G. 728 ; and see *Tanner v. Heard*, 3 Jur. N. S. 427, M. R.

6 *Wilson v. Metcalfe*, 3 Mad. 45.

off the principal money and interest due upon the mortgage:¹ the estate being considered as much a security for costs as for the principal and interest; and a decree for costs almost necessarily following a decree for payment of principal and interest.² If, however, in a foreclosure³ or redemption⁴ suit, it turns out, on taking the account, that on the day on which the bill was filed (to which time the account will be directed,) nothing was due to the mortgagee, he must bear the expense of the suit; and where a mortgagee in possession, by his answer untruly alleged that the mortgage was not satisfied, he was ordered to pay the costs subsequent to his answer.⁵

Where a mortgagee files a bill to foreclose, and a question arises at the hearing whether he has not received sufficient to pay off the incumbrance before commencement of the suit, the costs will be reserved.⁶

A defendant should raise his defence in the least expensive manner; therefore, if he enters into evidence in a case in which he might have demurred⁷ or pleaded,⁸ the bill will be dismissed without costs; or the defendant will be disallowed the extra costs occasioned by his having defended the suit.⁹ And plaintiffs, who instituted two suits where one would have been sufficient, have been refused the costs occasioned by the double proceedings.¹⁰

In coming to a decision upon the subject of costs, the Court is frequently governed by its wish to discourage unnecessary litigation. In *Millington v. Fox*,¹¹ Lord Cottenham said, that he was very much disposed, as a general rule, to make the costs follow the

1 *Owen v. Griffith*, 1 Ves. S. 250; *Amb. 520*; *Lord Trillemston v. Hamill*, 1 B. & B. 377; *Wilson v. Metcalfe*, 1 Russ. 530, 536; but see *contra*, *Woodroft v. Soys*, cited *Beames on Costs*, p. 26.

2 *East India Company v. Elkins*, 2 Bro. P. C. ed. Toml. 382; 6 Vin. Ab. 365, pl. 13; *Thomas v. Puddlesbury*, Sel. Ca. Ch. 61.

3 *Binnington v. Harwood*, T. & R. 477, 485.

4 *Barlow v. Gains*, 23 Beav. 244.

5 *Montgomery v. Calland*, 14 Sim. 79, 81; and see *Snagg v. Frisell*, 3 Jo. & Lat. 383; *Powell v. Trotter*, 1 Dr. & Sm. 388.

6 *Goederham v. De Grassi*, 2 Grant, 135.

7 *Jones v. Davids*, 4 Russ. 277, 278; *Hill v. Reardon*, 2 S. & S. 431, 439; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Webb v. England*, 29 Beav. 44; 7 Jur. N. S. 153; *Ernest v. Weiss*, 9 Jur. N. S. 145, V.C.K.; *Nesbit v. Berridge*, ib. 1044; 11 W. R. 446, 443 M. R.; but see S. C., 10 Jur. N. S. 53; 12 W. R. 283, L. C.; *Morocco Company v. Fry*, 11 Jur. N. S. 76, 78; 12 W. R. 310, 312, V.C.S.

8 *Sanders v. Benson*, 4 Beav. 350, 357; *Jackson v. Ogg*, Johns. 397, 402.

9 *Godfrey v. Tucker*, 33 Beav. 290; 9 Jur. N. S. 1188, M. R.; and see *Morgan & Davey*, 77, et seq.

10 *Benuean v. Nehemias*, 4 De G. & S. 311, 387.

11 3 M. & C. 338; and see observations of Lord Westbury in *Edleston v. Edleston*, 1 De G. J. & S. 185; 9 Jur. N. S. 479.

result ; because, however doubtful the title might be, or however proper it might be to dispute it, it was but right that the party who really had the right should be reimbursed, as far as giving him the costs of the suit could reimburse him ; but then there was another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which were essential to enable the parties to vindicate and establish their rights ; and accordingly his Lordship, although he held that the plaintiffs were entitled to part at least of the relief they prayed, refused to give them the costs of the cause : because it appeared that the defendants had written to the plaintiffs a letter offering terms which would have rendered the suit unnecessary : which letter, his Lordship held, as to costs at least, rendered it incumbent on the plaintiffs to put to the test whether the defendants were sincere in their offer, and not to go on with the suit, unless they found that they were insincere.¹ The principle to be deduced from this case seems to be, that if a plaintiff proceeds with a cause after he has received a complete offer of all that he is entitled to, the Court, in the exercise of its discretion with respect to costs, will punish the unnecessary litigation, by refusing him the whole costs of the suit : as well those incurred after the tender as those incurred before.² This principle was not, however, adopted by Sir James Wigram, V. C., to its full extent, in the case of *Colburn v. Simms* :³ for although the defendant in that case had written a letter to the plaintiffs, offering what his Honor considered they were entitled to demand, yet he only refused the plaintiffs such costs as were incurred after the plaintiffs were in the wrong ; and he observed that, in the case of *Millington v. Fox*, Lord Cottenham's attention was not called to the fact that the expense of filing the bill had been incurred before the plaintiffs received the letter offering compensation.

Unless the offer of the defendants extends to everything that the plaintiff has a right to demand, whether in the nature of relief or of

1 3 M. & C. 353, 354 ; and see *Mender v. McCready*, 1 Moll. 119 ; *Macartney v. Graham*, 2 R. & M. 353 ; *McAndrew v. Bassett*, 10 Jur. N. S. 492, V. C. W. ; *Moat v. Couston*, 33 Beav. 578 ; *Chester v. Metropolitan Railway Company*, 13 W. R. 333, M. R. ; *Hooken v. Sinecock*, 11 Jur. N. S. 477 ; 13 W. R. 487, V. C. E. ; and see *Morgan & Davey*, 72.
2 *Holden v. Eymaston*, 2 Beav. 204, 206 ; *Moat v. Couston*, 33 Beav. 578, 581 ; *Hooken v. Sinecock*, *ubi sup.* ; but see *Wainwright v. Sewell*, 11 W. R. 560, V. C. S.
3 2 Hare, 543, 561 ; 7 Jur. 1104 ; see also *Williams v. Sorrell*, 4 Ves. 339.

costs, the Court will not punish the plaintiff for declining the offer by refusing him his costs;¹ and the rule appears to be general that, wherever costs have been necessarily incurred by a plaintiff in seeking a demand, a tender by the defendant to obviate future costs must extend to the costs already incurred.² A plaintiff, in refusing to accept a tender of the amount due, because the costs do not form part of the tender, must be careful to ascertain that costs have been actually incurred by him: otherwise, he will subject himself to the payment of any future costs which he may occasion to the defendant.³

A tender, to be effective, must be of the whole sum due, and, as has been stated, of the costs, if any have been incurred; and if a tender is refused, and it afterwards appear that the sum actually due exceeds the amount tendered, the defendant will not be exempted from costs.⁴ A tender must also be specific, and although it may be of a larger sum than is actually due, yet, if such tender is coupled with a direction to the plaintiff to take out of it such a sum as is actually due to him, it will not be good.⁵ So also, if the tender be clogged with conditions which the party has no right to impose, it will not be effective to excuse the party making it, from the costs; therefore, where an executor, although he had offered to pay a legacy given in trust for the testator's daughter for life, and afterwards to her children, had qualified his offer, by insisting that it should be laid out in such security as he should approve of, Lord Gifford, M. R., ordered the costs to be paid out of the testator's general estate to which the executor was entitled as residuary legatee: on the ground that the executor had no right to add such a stipulation to his offer.⁶

If a tender is not legal, a Court of Equity will not support it; nor will it supply a defect in a tender against a rule of Law, unless, perhaps, where fraud is used to prevent its operation;⁷ and where parties came into Equity, to be relieved from a legal demand, on

1 *Kelly v. Hooper*, 1 Y. & C. C. C. 197, 200; *Geary v. Norton*, 1 De G. S. 9, 12; *Janteson v. Teague*, 3 Jur. N. S. 1206, V. C. W.

2 *Worrall v. Miller*, 3 Anst. 632; *Collins Company v. Walker*, 7 W. R. 222, V. C. K.; *Burgess v. Hall*, 26 Beav. 244; *Burgess v. Hatcly*, *ib.* 249; *Wallis v. Wallis*, 4 Drew. 458; *M'Andrew v. Bassett*, 10 Jur. N. S. 492, V. C. W.

3 *Heaning v. Wallis*, 2 Gwill. 898; *Beames on Costs*, 43.

4 *Taylor v. Hall*, 2 Gwill. 611, n. (a); *Worrall v. Nickolls*, 3 Gwill. 1302; *Beames on Costs*, 43.

5 *Drake v. Brooking*, 2 Gwill. 694; and see *Runney v. Willis*, *ib.* 775; *Beames on Costs*, 45, 44.

6 *Walter v. Patey*, 1 Russ. 375.

7 Per Lord Hardwicke, in *Gammon v. Stone*, 1 Ves. S. 339.

the ground that they had made a tender, Lord Hardwicke refused to relieve : because the tender might have been pleaded at Law.¹

A tender must be proved : a mere statement of it, in an answer, is not generally sufficient to save the costs.²

The principle upon which the Court acts, in admitting a tender, duly proved, as a ground for excusing the party making it from payment of costs, namely, the encouragement of attempts to prevent litigation, will apply the cases of account, where, although, from the uncertain state of the account, the accounting party is not able to make a specific tender of the balance due from him, yet, if he has shown a willingness to render an account, the Court will, upon final adjudication, take such willingness into consideration, and exonerate him from paying the costs to the other party ; although the result may be that the balance is against him. Thus, on a bill filed to call a trustee to an account, it was said, by Lord Keeper Coventry, that if he, by answer, submits readily to it, though on the account he be found in debt, yet he shall pay interest for the balance only from the time of the account liquidated, and no costs if he has not misbehaved himself.³ In that case, however, the defendant had said in his answer, he believed the plaintiff considerably indebted to him, and after the matter had depended twenty years, was found 200*l.* in the plaintiff's debt ; and the Lord Keeper therefore decreed, that he should pay interest from the time of the bill : "for he had admitted, by his answer, that he had not kept any money for the plaintiff useless or unemployed ; and in a manner had dared the plaintiff to the account, and, therefore, must pay the costs : as the plaintiff must have done, if he had been found indebted to him." So, where a bill was filed against an *elegit* creditor, for an account, who, knowing that the balance was against him, contested the mode of taking the account and failed, he was ordered to pay such part of the expense of taking the account as was incurred after his debt was paid off.⁴ It is to be observed that, in this latter case, the defendant was fixed with the costs, on the

¹ Per Lord Hardwicke, in *Gannon v. Stone*, 1 Ves. 8. 339.

² *Milnes v. Davison*, 3 Madd. 374.

³ *Parrot v. Treby*, Prec. in Ch. 254 ; see also *Bennett v. Atkins*, 1 Y. & C. Ex. 247, 249 ; *Ashburnham v. Thompson*, 18 Ves. 402 ; but see *Attorney-General v. Brewers' Company*, 1 P. Wms. 376.

⁴ *Skirrett v. Athey*, 1 B. & B. 430.

ground that he had improperly contested the mode of taking the account, otherwise he would not have been made to pay them : the rule of the Court being, as we have seen, that an incumbrancer upon an estate is not bound to deliver possession, until his costs are paid, as well as his principal and interest, the estate being as much a security for one as the other.¹

It may be collected, from many of the cases referred to, that the Court regards, in some respects, the granting of costs to a party somewhat in the light of a testimonial of good conduct ; and that it will, generally, withhold such testimonial from a party who has been guilty of any misconduct, with reference to the subject of the suit :² even where, under other circumstances, that party would have been considered entitled to them. This position is strongly exemplified in the case of mortgagees or incumbrancers, whose *prima facie* right to costs may, as we have seen, be defeated by their conduct. And so, although there is no rule more general with respect to costs than that, "where the bill claims, on the ground of fraud, the decree or order of dismissal shall be with costs,"³ yet, where the party succeeding is *particeps criminis*, the Court will not consider him entitled to the costs of the litigation, as in the case of bills for the delivering up of securities, given upon considerations which are contrary to the policy of the law.⁴ Therefore, although the Court, acting upon principles of public policy, will set aside a marriage brokerage bond, at the instance of the husband, yet it will do so without giving him the costs of the suit which he has instituted for that purpose ; and so, where a bill was filed for delivering up a bond, given by the plaintiff to the defendant's wife, in consideration that she would use the influence and power she had over the plaintiff's grandfather, (a man of eighty-two,) to induce him to leave his whole estate to the plaintiff, the Court, although it set

1 *Owen v. Griffith*, 1 Ves. S. 250 : Amb. 250.

2 *Armstrong v. Blake*, 1 Moll. 178 ; *Clowes v. Beak*, 2 De G. M. & G. 731, 739 ; *Hunter v. Nockolds*, 2 Phill. 540, 545 ; *Langhorne v. Harland*, 2 Jur. N. S. 872, V.C.S. ; *Mirehouse v. Herbert*, 3 Jur. N. S. 1238, V.C.S. ; *Holmes v. Eastern Counties Railway*, 3 K. & J. 675 ; *May v. Biggsden*, 24 Beav. 207 ; *Great Luxembourg Railway v. Magnay*, 25 Beav. 586, 599 ; *Williams v. Page*, 23 Beav. 148 ; *Marquis of Clanricarde v. Henning*, 30 Beav. 175 ; *Robson v. Earl of Devon*, 4 Jur. N. S. 245, L. C. & L.J.J.

3 *Scott v. Dumbas*, 1 Moll. 442.

4 *Debenham v. Os*, 1 Ves. S. 270 ; *Mars v. Warner*, 3 Giff. 100 : 7 Jur. N. S. 1238 ; *Mars v. Barle*, 3 Giff. 108 : 7 Jur. N. S. 1231 ; *contra*, *Jackman v. Mitchell*, 15 Ves. 561, 567 ; *Mars v. Sandford*, 1 Giff. 288 : 5 Jur. N. S. 1359 ; *W. v. B.* 32 Beav. 574.

aside the bond as being given without consideration, gave no costs on either side.¹

The plaintiff filed his bill founding his right to relief *inter alia* on the ground of fraud, which he entirely failed to establish, and in his bill he had made statements, which he knew to be untrue, and suppressed the truth in other matters; the Court, considering him entitled to relief on other grounds which he had sustained, made a decree in his favour, but without costs.² Where a suit was brought for redemption and the defendant set up an absolute conveyance by way of answer which he sustained by the evidence, the Court, though it dismissed the bill, refused the defendants their costs up to the hearing, in consequence of the untruthfulness of their answers.³ Although the general rule is that in a suit to redeem, if a balance is found due to the defendant, he will be ordered to receive his costs, still, where on the settlement of certain land transactions between vendor and purchaser, the former, together with his solicitor, made up a statement shewing a balance due to him of £417, for which the vendor who was old and illiterate, executed a mortgage on his estate, but on taking the accounts in the Master's Office, it was shewn that at the time of taking the security only £27 6s. 4d. was due: the Court, upon a bill filed by the mortgagor, against the executors of the mortgagee, impeaching the whole transaction for fraud, ordered his estate to pay all the costs of the litigation.⁴

The Court expects that there should be an absence of fraud, on the part of the party applying to it for relief; and even where there has been no positive fraud, but the conduct of the party has not been strictly honourable, it will, in cases where the application is to the discretion of the Court, visit him with costs;⁵ and so, if a party obtains an unconscionable advantage over another, the Court, although it may not feel itself justified in depriving him of the advantage he has gained, will not give him his costs of enforcing it. Therefore, where a purchaser obtained a bargain at an inadequate price, but which the Court might be bound to enforce, it would not

¹ *Debenham v. Os*, 1 Ves. B. 276.

² *Hughson v. Davis*, 4 Grant, 538.

³ *Finlayson v. Millard*, 10 Grant, 130.

⁴ *Souter v. Burnham*, 10 Grant, 275.

⁵ *Davis v. Symonds*, 1 Cox, 402, 408.

give him costs against the seller, whose estate he had obtained at an under value.¹ So, where a plaintiff has slept upon his rights, and has allowed the defendant to suppose that he would not enforce them, he will frequently, although successful, be deprived of his costs: as, where there had been no demand, nor any rent paid, for thirty years, but the person who was entitled recovered upon a verdict, Lord Hardwicke said the defendant must pay the costs at law, but as the *laohes* arose on the part of the plaintiff, and the obscurity of the title to the rent, from the want of a demand for such a length of time, he should not be allowed costs against the defendant in Equity.²

Where defendants set up a defence to a bill, which if tenable, would have formed sufficient grounds for their having taken steps to set aside the transaction which it was now sought to enforce, but had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the Court under the circumstances ordered them to pay the costs.³

Sometimes where there has been a misunderstanding between the parties, and the bill is in consequence dismissed, the Court will not give costs to the defendant. Thus, where a bill was filed for a specific performance, and the Court was of opinion that there was no concluded agreement, and that all the correspondence together did not amount to more than a treaty, it dismissed the bill, but, in consideration that it appeared to have been a case of misunderstanding, arising from the want of clear unequivocal conduct and language, it was dismissed without costs.⁴ The Court has also refused costs to a vendor, although it decreed specific performance at his suit, in cases in which the vendor's own representation had given the purchaser a probable cause of suit.⁵

Where, before the expiration of the time appointed by a contract for the payment of the purchase money of a lot of land, the vendee became dissatisfied with the title of his vendor as it appeared on the

1 *Burrows v. Lock*, 10 Ves. 470, 476; *Sug. V. & P.* 653.

2 *Anon.*, 2 Atk. 14; see also *Clifton v. Orchard* 1 Atk. 610; *Pearce v. Newlyn*, 3 Mer. 186, 189; *Guest v. Hoinfray*, 5 Ves. 818, 824; *Lee v. Brown*, 4 Ves. 362, 369.

3 *Miller v. Ostrander*, 12 Grant, 349.

4 *Stratford v. Bonworth*, 2 V. & B. 341, 348; *Marquis Townshend v. Stangroom*, 6 Ves. 328, 341.

5 *Fenton v. Browne*, 14 Ves. 144, 150; *Harrison v. Coppard*, 2 Cox, 318, 320.

books of the Register Office of the county, and without any communication with the vendor, filed a bill to rescind the contract, or to have it specifically performed if it should appear that the vendor could make a good title; and at the hearing the plaintiff (the vendee) expressed his willingness to accept the title: the Court, with the consent of the defendant, offered the plaintiff a decree for specific performance on payment of costs; or, if that were refused, ordered that the bill be dismissed with costs.¹ The steps which the vendee of an estate who desires the specific performance of the contract of sale should take before filing a bill for that purpose, in order to entitle him to the costs of the suit, are considered in *Hutchinson v. Rapelje*.²

Where a defendant would have been entitled to the costs of the suit up to the hearing, but for an offer which the plaintiff made by letter, after the answer was filed, to accept a sum he named, and to which he mentioned he thought he would be entitled if he failed in establishing the larger claim he made by his bill, and by which offer it was proposed that each party should pay his own costs, but the Court decided both against the larger claim, and the view referred to, but granted a decree for an account on a different footing, which it was alleged would result in shewing the amounts mentioned in the letter to be about the true amount; it was held that these circumstances did not entitle the plaintiff to have costs reserved until the taking of the account.³ Where a bill by a purchaser seeking specific performance of a contract for the sale of lands is dismissed because a good title cannot be shewn, the Court will order a sum paid on account of the purchase money to be returned to the purchaser, and in default, give him a lien therefor on the estate agreed to be sold; but in such a case, unless the vendor has been guilty of fraud in the transaction, the bill will be dismissed without costs, the rule being that when a bill filed by a purchaser to enforce specific performance of a contract of sale is dismissed for want of title in the vendor, and no fraud can be attributed to him, the Court refuses to give to either party costs; and such refusal to give costs proceeds, not from any want of jurisdiction to afford

¹ *Curren v. Rapelje*, 2 Grant, 542.

² *Hutchinson v. Rapelje*, 2 Grant, 583.

³ *Covert v. Bank of Upper Canada*, 3 Grant, 246.

that relief, notwithstanding the dismissal of the bill, but upon this principle, that as the purchaser could, and no doubt did, inform himself as to the state of the vendor's title, and knew that he could not obtain any relief, he had filed his bill without any expectation of success, and therefore could not be considered entitled to his costs.¹ Where a defendant's own letter was such as to create a misapprehension of facts, and a suit was instituted in consequence, the Court, although it refused the relief asked, dismissed the bill without costs.² Where the Provincial Government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned by the Government, the patent was set aside as having issued in error and mistake, but, under the circumstances, without costs.³ The Court will in some cases dismiss a bill, but without costs where the declarations of the defendant tended to create a misapprehension of facts.⁴

In cases also where one party, upon the construction of a doubtful point of law, has obtained a great advantage over the other, the Court will not give him his costs: as, where an annuity was charged upon real estate, payable to the annuitant only upon his own receipt, and the annuitant became bankrupt, whereupon a bill was filed by his assignees against the owner of the estate for the recovery of the annuity, and a case was directed to the Court of King's Bench, who certified that the annuity had ceased by the bankruptcy: upon the equity reserved, the bill was dismissed without costs: Lord Alvanley, M. R., saying, it was a doubtful point, and the defendant had a great advantage by the failure of the bankrupt, but that he would consider of the costs at Law.⁵

As the Court will not tolerate fraud in any form, so will it discountenance a groundless allegation of fraud in a bill or other pleading; and upon this principle it is that the rule has been established that, where the bill claims on the ground of fraud, an order of dis-

¹ *Hurd v. Robertson*, 7 Grant, 142.

² *Anderson v. Cameron*, 6 Grant, 286.

³ *Attorney-General v. Hill*, 8 Grant, 532.

⁴ *Anderson v. Cameron*, 6 Grant, 285; and see *McLaughlin v. Whiteside*, 7 Grant, 573; *Ratz v. Tyles*, 11 Grant, 342.

⁵ *Dommett v. Bedford*, 3 Ves. 149.

mission shall be with costs;¹ and a party introducing unfounded charges of fraud, will be made to pay the costs occasioned thereby: though he may be successful in the suit;² or the other party may have acted in such a manner as to give reasonable grounds of suspicion;³ and for the application of this principle, it is not necessary that the word "fraud" should be made use of; a substantial imputation of it is sufficient.⁴ Mere exaggerations or overstatements will not, however, deprive a successful party of his right to costs;⁵ and where the parties have acted in such a manner as to render the charges of fraud not unreasonable, no order will be made as to the costs occasioned thereby.⁶

Where a plaintiff without proper enquiry into facts, and with undue haste, filed a bill in this Court to enforce a judgment at law, in which he made charges of fraudulent practices against the defendant, the Court, while granting him the relief to which he was strictly entitled, refused him his costs of the suit, and ordered him to pay the costs of the defendants.⁷ The owner of land deposited his title deeds on 19th May, for the purpose of having prepared a mortgage thereof, which was accordingly made out, and executed on 30th May. The preceding day the mortgagor made a lease, of which, however, the mortgagee had not any notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed, but the mortgagee, having in his answer deliberately sworn either to what was untrue or to what he did not know to be true, the Court refused him his costs, although costs were given to the other defendants.⁸ Where the plaintiff made charges of improper conduct against the administratrix, which were not sustained in evidence, he was ordered to pay all costs, other than of

1 *Scott v. Dunbar*, 1 Moll. 442; *Pierce v. Franks*, 10 Jur. 25, V.C.K.B.; *Langley v. Fisher*, 9 Beav. 90, 104; *New Brunswick & Canada Railway Company v. Conybeare*, 9 H. L. Ca. 711: 8 Jur. N. S. 575; *Luff v. Lord*, 11 Jur. N. S. 50, L. C.; 10 *ib.* 1249, M. R.; see also *Ambrose v. Dunnison Union*, 9 Beav. 508, 514; *Morgan & Davey*, 73.

2 *Wright v. Howard*, 1 S. & S. 190, 206; *Thomas v. Phillips*, 11 Jur. 30, V.C.K.B.; *Staniland v. Willott*, 3 McN. & G. 604, 606, 632; *West v. Jones*, 1 Sim. N. S. 206, 213; *Pledge v. Bass*, Johns. 663; *Blest v. Brown*, 8 Jur. N. S. 602: 10 W. R. 569, L. C.; *Jones v. Ricketts*, 10 W. R. 576, M. R.; *Douglass v. Culverwell*, 3 Giff. 251: 8 Jur. N. S. 29, 34; *Straker v. Ewing*, 11 Jur. N. S. 127: 13 W. R. 236, M. R. For mode of the apportionment of the costs, see *Heming v. Leischild*, 8 W. R. 352, V.C.W.; 9 W. R. 174, L.J.J.

3 *Thayer v. Tombs*, 12 W. R. 512, V.C.W.

4 *Marshall v. Sladden*, 7 Haro. 428, 444.

5 *Thomas v. Lloyd*, 3 Jur. N. S. 238, V.C.W.; *contra*, *Ravelins v. Wickham*, 1 Giff. 355: 4 Jur. N. S. 990; 3 De G. & J. 304: 5 Jur. N. S. 278.

6 *Griggs v. Staplee*, 2 De G. & S. 572, 590; and see *Thompson v. Webster*, 4 De G. & J. 600: 5 Jur. N. S. 921: overruling S. C. 4 Drew. 628: 5 Jur. N. S. 668.

7 *Neal v. Winter*, 9 Grant, 261.

8 *McKay v. Davidson*, 13 Grant, 493.

an ordinary administration suit.¹ It may here be noticed that executors will be ordered personally to repay costs paid to them or their solicitor under a decree, which is afterwards reversed on appeal.² Where an answer improperly impugned the motives of the solicitor who filed the bill, the Court, although it dismissed the bill with costs, directed the costs of the answer to be disallowed to the defendant.³

Where the conduct of both parties has been equally reprehensible, the Court will also abstain from giving costs in favour of either party; thus, where, under a reference to inquire into a vendor's title, it was found that the abstract delivered by the vendor before the filing of the bill was sufficient, but that the purchaser required certain evidence in support of the abstract, some of which was necessary but not furnished, and some not necessary, Lord Eldon decided, that both the parties were in the wrong; and, upon the vendor's bill, he held that no costs ought to be given on either side.⁴ Where, however, the vendor had failed in making out his title, upon an objection to the abstract taken by the purchaser, but he afterwards succeeded in establishing it upon another ground, the Court, although it directed the performance of the contract, gave the costs to the purchaser.⁵

Three persons having entered into several contracts, in the name of one of the three, for the construction of portions of a railroad without any written articles of agreement as to the share each should have after the completion of the works disputed as to the share each should have in the contracts, and a bill was filed by one of them, to have an account taken claiming a larger share in the profits than the Master allowed him by the report, from which all parties appealed, being dissatisfied therewith, and by arrangement the Court below affirmed the finding of the Master with the view of taking the opinion of the Court of Appeal thereon. The Court of Appeal, on affirming the order of the Court below, refused the costs of the appeal to either party.⁶

¹ *Hodgins v. McNeil*, 9 Grant, 305.

² *Davidson v. Thirkell*, 1 Grant, 384.

³ *McKenzie v. Fielding*, 11 Grant, 406.

⁴ *Newall v. Smith*, 1 J. & W. 263. As to costs, in suits for specific performance, see *Onions v. Cohen*, 2 H. & M. 364; 11 Jur. N. S. 198; *Morgan & Davey*, 177 *et seq.*

⁵ *Fielder v. Higginson*, 3 V. & B. 142; and see *Sidebotham v. Barrington*, 5 Beav. 261.

⁶ *Nichols v. McDonald*, in appeal, 8 Grant, 106.

And where both parties had been equally foolish, the one in selling and the other in buying an estate which was liable to be defeated upon a contingency, which contingency had actually happened before the contract was entered into, *L. C. B. Richards*, although he set aside the contract, ordered each party to pay his own costs.¹

It has been said, that, in suits for the specific performance of agreements for the sale or purchase of estates, the circumstance of the title being bad only makes a *prima facie* case for costs, which is capable of being rebutted by circumstances ;² and, in *Staines v. Morris*,³ Lord Eldon remarked, that, as to the costs of a suit in Equity, although it was in many cases very hard that they should follow the event of the cause, yet all his experience had persuaded him that it was much to be wished that the course of the Court was so ; but that certainly it was not the present course of the Court ; and that where there is a fair case for consideration, it was not the course to visit the party who fails with costs. In that case, his Lordship, although he held that the purchaser was wrong in resisting a covenant which he was bound to enter into, yet, as the Master's opinion had been the other way, and the Judges at Law would not decide the case until they had the opinion of the Court of Chancery, and professional men had differed upon the question, it would, he said, be too presumptuous in him to set such a value upon his own opinion, by marking the resistance of the purchaser with costs ; and, therefore, he made the decree without costs.⁴

Upon the same principle, where a bill was filed against a purchaser for the specific performance of his agreement, and the question turned upon a point of law, which had been determined in favour of the plaintiff's view by the Court of Exchequer, Lord Rosslyn, although he differed from the Court of Exchequer, and therefore felt himself compelled to dismiss the plaintiff's bill, yet as he could not make a purchaser take a title in the face of the decision of the Exchequer, he dismissed the bill without costs.⁵

¹ *Hitchcock v. Giddings*, Dan 1 : 4 Pri. 135.

² *Edwards v. Harvey*, G. Coop. 40 ; *Monro v. Taylor*, 8 Hare, 51 ; *Abbot v. Swooner*, 4 De G. & S. 448, 460 ; *Sherwin v. Shakspeare*, 17 Beav. 267 ; *Freer v. Hesse*, 4 De G. M. & G. 495.

³ 1 V. & B 8, 16.

⁴ See Sug. V. & P. 649.

⁵ *Ross v. Calland*, 5 Ves. 186.

And so, in *White v. Foljambe*,¹ Lord Eldon dismissed the bill without costs: the ground of his judgment, as his Lordship afterwards said,² being, that the question was a pure question of title, which raised very considerable difficulties in the minds of those most capable of judging upon such a subject. And so, where the report was in favour of the plaintiff's title, and exceptions were taken to the report, upon the hearing of which the Court thought the title too doubtful, an order was made dismissing the plaintiff's bill, but without costs.³

Although the Court will not, in general, visit with costs a party who resorts to the Court in a doubtful case, yet, if he is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and his bill will be dismissed with costs.⁴ And wherever the doubt has been occasioned by the conduct of the party himself, the Court will deprive him of his costs, though he succeeds in the suit.⁵

Where the Court comes to a decision, upon a point of law which is contrary to a former decision, either of this Court, or of any other of competent jurisdiction, it will generally exonerate the party against whom it decides, from the payment of costs to his adversary: as in the case of *Rose v. Calland*,⁶ before referred to; but where the point has been decided before, and the Court thinks that the decision was correct, it will, if the party, against whose interest the decision is, had notice of the previous determination, fix him with the costs of the litigation. Thus, where a bill was filed for specific performance, and the purchaser set up an objection to the title which had already been decided in a former case, of which the purchaser had notice, the purchaser was decreed to pay the costs of the suit.⁷ And in suits for specific performance, it is not the mere failure of an objection, taken by the purchaser to a title, that will fix him with costs: a purchaser is considered as entitled to take a fair objection; and, although it be overruled, yet

1 11 Ves. 337; and see *Bond v. Bell*, 4 Drew. 157; 3 Jur. N. S. 1290.

2 See 11 Ves. 463.

3 *Willcox v. Bellaers*, T. & R. 491, 495.

4 Per Lord Hardwicke, in *Biggleston v. Grubb*, 2 Atk. 48.

5 *Blunt v. Cumyns*, 2 Ves. S. 331.

6 5 Ves. 186.

7 *Bleese v. Wile*, 3 Mer. 456; and see *Barton v. Barton*, 3 K. & J. 512. *Seem*, a party is not bound to be acquainted with a case which has not appeared in the authorised reports: *Pigott v. Young*, 7 W. R. 226, V. C. K.

the Court will not, on that ground, give costs against him.¹ This, however, must always depend upon the weight which the Judge may think due to the objection.²

It is, however, only where the case turns upon a question of law, upon which the opinion of the Court may be fairly taken, that the unsuccessful party will be excused the payment of costs: if there is a decided objection to the case set up, the party setting it up will be compelled to pay them. Thus, where a vendor sells an estate, his title to which is clearly bad, the Court will dismiss his bill with costs;³ and this it will do, even where the defect has been occasioned by an accident: as where the title deeds were burnt, after the contract.⁴ It seems, also, that if there is one substantial objection to the plaintiff's case, which prevails, the circumstance that the defendant has taken others which have failed, will not relieve the plaintiff from his costs. Thus, where a purchaser obtained an issue upon a question of pedigree, in which the vendor failed in establishing his title, the bill was dismissed with costs, although the purchaser had taken several objections, and had only succeeded in the one relating to the pedigree: the Court observing, that, although the objections were overruled, they might have been very properly made though an answer was given to them, or they were removed.⁵

Where the only defence set up by the defendant failed, and the ground on which the Court decided against the plaintiff was not taken, or even pointed to in any manner by the answer, the Court, though it dismissed the bill, refused the defendant his costs of the suit.⁶ Where a bill was filed to set aside a conveyance as having been made to hinder creditors, on grounds which the plaintiff failed to substantiate, but the evidence of the grantee himself shewed that on other grounds the plaintiff was entitled to relief at the

¹ *Sup. V. & P. 649*; *Cox v. Chamberlain*, 4 Ves. 631, 638; *Staines v. Morris*, 1 V. & B. 8, 14; *Sharp v. Roache*, 2 Rose, 192.

² *Sup. V. & P. 649*; see *Burnaby v. Griffin*, 3 Ves. 266, 277; *Bishop of Winchester v. Paine* 11 Ves. 194, 201; *Powell v. Martyr*, 8 Ves. 146, 149; *Fludyer v. Cocker*, 12 Ves. 25, 27; *Calverley v. Williams*, 1 Ves. J. 210, 218; *McQueen v. Farquhar*, 11 Ves. 467, 482; *Weddall v. Nixon*, 17 Beav. 160, 170; and see *Thomas v. Townsend*, 16 Jur. 736, V. C. K.

³ *Playford v. Hoare*, 3 Y. & J. 176.

⁴ *Bryant v. Buek*, 4 Russ. 1, 6. In that case, the Court seemed inclined to make an order, that the plaintiff should concur with the defendant in giving an order to the auctioneer to return the deposit paid by the defendant, at the sale of the estate: *ib. 6*.

⁵ *Edwards v. Harvey*, G. Coop. 40; see *Townsend v. Champenourne*, 3 Y. & C. Ex. 506, 527.

⁶ *McAdmany v. Turnbull*, 10 Grant, 298.

hearing, leave was given him to amend setting forth such ground, and a decree was made in his favour, but, under the circumstances, without costs.¹ Where a purchaser filed a bill alleging that his vendor could not make a good title to the lands agreed to be sold, but at the hearing, waived a reference as to title, admitting the same to be good, the Court ordered the plaintiff to pay costs.²

The rule upon this subject formerly was, that, if a purchaser made the suit necessary by a frivolous objection to the title, he must bear the costs which he had improperly occasioned; but if he stated a serious objection, as to which it was reasonable that he should have the title fortified by the opinion of the Court, the Court would not compel him to pay costs, although the objection failed.³ The principle was the same with respect to the purchaser's suggestion of doubt as to matters of fact. The present practice, however, is generally to make the costs follow the result.⁴

If the Court thinks an objection groundless, although it is supported by the opinion of counsel upon which the purchaser has acted, yet the party taking it will be compelled to pay the costs: for the Court cannot allow the mistaken advice of a third person to operate, to the disadvantage of the party who is clearly in the right.⁵

And where one of the objections of a purchaser to a title arose from the circumstance, that, on an abstract which had been made use of on a former occasion, a certain observation appeared, implying a doubt whether a title could be made unless a particular appointment should be executed, and suggesting certain possibilities and probabilities which, if true, would render the title objectionable, Lord Eldon, being of opinion that a good title was made, said, that he should very reluctantly lay down that a notice from opinions in an abstract, or any thing that appears upon a deed, that there may by any possibility be reason to suspect (what he could not know, and might not be true,) that the title was bad, was

1 *Watson v. McCarthy*, 10 Grant, 416; and see *Weite v. Ferris*, 10 Grant, 98.

2 *Tisdale v. Shortiss*, 10 Grant, 271.

3 *Thorpe v. Freer*, 4 Madd. 466; see also *Aislable v. Rice*, 3 Madd. 256, 260.

4 *Career v. Richards*, 6 Jur. N. S. 667, M. R.; see, however, *Malden v. Fyson*, 9 Beav. 247; *Sag. V. & P.* 646.

5 *Making v. Hill*, 1 Cox, 186; see also *Vancouver v. Bliss*, 11 Ves. 458, 462.

such a notice as would affect the purchaser, and that, if the objection was no more than a question of title, he should act hardly by the purchaser by not giving the title the credit of making him pay the costs: "for it would help the title."¹

In most of the cases before stated, the Court, in withholding the costs of the suit from the successful party, has been influenced by his conduct with reference to the suit or the subject-matter of it. There are, however, many cases in which the Court, without any reference to the good or bad conduct of any party, has refrained from awarding costs to be paid by the unsuccessful party, solely from consideration of the peculiar hardship of the individual case; it is, however, useless to state them fully, since they involve no general principle.²

As a general rule, no order is made as to costs, in the case of a suit between husband and wife;³ and where a husband and wife, although living apart from each other, severed in their defence, and appeared by different solicitors, only one set of costs was allowed between them.⁴

Where a suit for specific performance is rendered necessary by the act of God: such as the lunacy of the vendor, or his dying intestate, the decree is generally made without costs;⁵ but where, after the contract for sale, the vendor makes a strict settlement of the property,⁶ or devises it, so that it becomes vested in infants, his estate must bear the costs of the suit.⁷

In the cases in which Courts of Law have assumed a concurrent jurisdiction with Courts of Equity, but the latter have not relinquished their jurisdiction over the subject, the Court of Chancery will not compel the party who seeks relief under its jurisdiction to

1 *McQueen v. Farquhar*, 11 Ves. 467, 482.

2 See *Shales v. Barrington*, 1 P. Wms. 481; *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Coppin v. Coppin*, *ib.* 291, 297; *Forbes v. Taylor*, 1 Ves. J. 99; *Brodie v. St. Paul*, *ib.* 326, 334; *Mosely v. Virgin*, 3 Ves. 184, 187; *Dickenson v. Lockyer*, 4 Ves. 36, 46; *Everett v. Backhouse*, 10 Ves. 94, 101.

3 *Vansittart v. Vansittart*, 4 K. & J. 62; see, however, *S. C. 2 De G. & J.* 249, 258; *Walrond v. Walrond*, Johns. 18; 4 Jur. N. S. 1099; *Re Wills*, 2 N. R. 107, V.C.W.; *Rotherham v. Battson*, 2 Sm. & G. App. 2; and see *Morgan & Davey*, 260.

4 *Garvey v. Whittingham*, 5 Beav. 268, 270; 6 Jur. 548.

5 *Cresswell v. Haines*, 8 Jur. N. S. 208; 10 W. R. 121, V. C. W.; *Hanson v. Lake*, 2 Y. & C. C. C. 328; *Hinder v. Streeten*, 10 Hare, 18; *Purser v. Darby*, 4 K. & J. 44; *Scott v. Scott*, 11 W. R. 796, V. C. K.; see 11 Jur. N. S. 480; *Barker v. Venables*, *ib.*: 13 W. R. 803, V. C. W.; and see *Morgan & Davey*, 186.

6 *Wortham v. Lord Dacre*, 2 K. & J. 437.

7 Per V. C. Wood, in *Purser v. Darby*, *ubi sup.*; *Sanderson v. Chadwick*, 2 N. R. 414, V. C. S.

pay the costs of his proceeding. Thus, where a bill was filed by one partner against another, to enforce contribution, and the Court allowed the case to stand over, in order that an action might be tried at Law, which was decided against the plaintiff, the Court although it dismissed the bill, did so without costs: being of opinion that, although the question was more proper to be tried at Law, the plaintiff was very well justified in coming for a contribution: for certainly the Court of Chancery had never given up its jurisdiction.¹

On the other hand, in the cases in which, after a bill dismissed, the plaintiff would have had a right to try the question over again at Law, the Court, for the purpose of putting an end to litigation, has frequently dismissed the bill without costs, upon the plaintiff's waiving his right to try the question at Law: a rule which has been usefully applied to suits for specific performance.²

The general rule of the Court is, that the successful party, although he may, as we have seen, be deprived of his costs, never pays them. Thus, it was held in *Lewis v. Lozham*,³ that, when a bill is dismissed, it is against the principle of the Court to order the defendant to pay the plaintiff his costs. The case was ordered to stand over, in order to enable the plaintiff's counsel to search for precedents the other way; but he did not produce any. It seems, however, from a note of the learned reporter, that, in a case before Sir Thomas Plumer, V. C., his Honour doubted, and seemed to think that a bill might be dismissed, and the defendant at the same time made to pay the costs.⁴

Where it is necessary that a bill should be filed by some person, the Court may order the costs to be paid out of the fund, although the bill is dismissed;⁵ and if, through the exertions of a plaintiff,

¹ *Wright v. Hunter*, 5 Ves. 792, 794.

² *Harnett v. Yielding*, 2 Sch. & Lef. 560; see also *Lawrenson v. Butler*, 1 Sch. & Lef. 13, 21; *Bunton v. Lister*, 3 Atk. 283, 287; *Underwood v. Hithcocks*, 1 Ves. 3. 279; *Leman v. Alie*, Amb. 163; *Attorney-General v. Owen*, 10 Ves. 555, 561.

³ 3 Mer. 429; see also *Wykham v. Wykham*, 18 Ves. 395, 423; *Attorney-General v. Oplender*, 1 Ves. J. 246; *Coote v. Jackson*, 6 Ves. 41; *Dixon v. Parker*, 2 Ves. 3. 219, 223; *Tidwell v. Ariel*, 3 Mad. 403, 409; *Dufaur v. Siget*, 4 De G. M. & G. 520, 525.

⁴ *Springfield v. Ollett*, cited 3 Mer. 430, n. Indeed, it appears, from the same note, that according to the decree in *Lewis v. Lozham*, Reg. Lib. 1816. B. 1059, the defendant was ordered to pay to the plaintiff his costs of a second reference as to title, and of the report thereon, but not of the former proceedings.

⁵ *Cranch v. Brissett*, cited in *Wheldale v. Partridge*, 5 Ves. 398; *Thomason v. Moses*, 5 Beav. 77, 81; 6 Jur. 403; *Hay v. Bowen*, 5 Beav. 610, 615; *Lynn v. Beaver*, T. & R. 63, 69; *Windsor v. Graham*, 1 Russ. 381, 347; *Boreham v. Bignall*, 3 Hare, 131; *Merlin v. Blagrave*, 25 Beav. 125; and see *Westcott v. Culliford*, 3 Hare, 274; 8 Jur. 166; *Lee v. Delane*, 4 De G. & S. 1, 6: 14 Jur. 861; *Morgan & Davey*, 67.

the Court is enabled to distribute a fund, or if it make a declaration of rights necessary for its administration, there, although the plaintiff may fail in his claim, the Court will not permit the other parties to carry off the fruit of his exertions, without defraying his costs out of the fund.¹

There are also some cases in which the successful party has, under peculiar circumstances, been made to pay the costs: thus, where the bill was filed for specific performance of an agreement to renew a lease, and the agreement proved by one witness was different from that stated in the bill, whilst the defendants, by their answer, set forth an agreement different both from that proved and that set up by the bill, specific performance was decreed according to the agreement stated in the answer, with costs against the plaintiff.² And where, at the suit of the grantee, an annuity, in the payment of which no default had been made, was declared charged on the real estate of the grantor, the plaintiff was ordered to pay the costs of suit.³

Another instance of departure from the rule, that the successful party has to pay no costs, may be found in the case of a *cestui que trust* making his trustee a defendant, to a suit instituted by him against a third party: in that case, the *cestui que trust*, although he obtains a decree against his trustee, must pay his costs, unless the trustee has been applied to, to join in the suit as co-plaintiff, and has refused.⁴ The proper course to be pursued, by a *cestui que trust* who intends to file a bill against a stranger relative to the trust property, is to apply to the trustee to become a co-plaintiff: indemnifying him against costs; and then, if he refuses, he must bear his own costs as a defendant.⁵

If a suit is occasioned by the misconduct or obstinacy of a trustee, he may be compelled to pay the whole costs of it. Thus, where a bill for specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance, Lord

¹ *Wedgwood v. Adams*, 8 Beav. 108, 106.

² *Mortimer v. Orchard*, 2 Ves. J. 243; see observations on this case in *Beames on Costs*, p. 112; see also: *Edwards Wood v. Marjoribanks*, 3 De G & J. 329; 5 Jur. N. S. 181; Affirmed 7 H. L. Ca. 806: 6 Jur. N. S. 1167.

³ *Norman v. Johnson*, 29 Beav. 77; 6 Jur. N. S. 906; *Burrell v. Delavants*, 30 Beav. 550: 8 Jur. N. S. 206.

⁴ *Reade v. Sparkes*, 1 Moll. 8.

⁵ *Ibid.*; and see *Pakington v. Benson*, 5 W. R. 670, V. O. W.

Thurlow was of opinion that the trustee ought to pay all the costs of the suit, and accordingly directed the plaintiff to pay to the other defendants all their costs of the suit, and recover them over, together with his own costs, from the defendant the trustee.¹

In the case last referred to, the Registrar appears to have doubted whether, according to the practice of the Court, the plaintiff, having been successful against the other defendants, and obtained against them a decree for specific performance, could, in point of form, be ordered to pay them their costs; but the Lord Chancellor thought that the decree was correct, according to the course of the Court. In fact, under ordinary circumstances, no other method exists, by which a defendant, who has by his conduct occasioned the suit, can be made to pay the whole costs of it: for the delinquent defendant cannot be decreed to pay the costs of a co-defendant to that defendant himself, as that would in effect be a decree between co-defendants. The only method, therefore, of effecting the object of compelling the delinquent defendant to pay the costs of the other defendant, is to order the plaintiff to pay them, and then to permit him to receive them again from the defendant, whose delinquency has given rise to the litigation.² In suits, however, in which the Attorney-General is plaintiff,³ and in interpleader suits, costs may be ordered to be paid by one defendant to another.⁴

This is the present English and was formerly our practice, but our Order 319 has changed it by providing that "where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by the one defendant to the other directly: and it is not to be necessary to order payment through the plaintiff." Where a solicitor adopts a course which is obviously unreasonable and perverse, the Court will order him to pay the costs occasioned by such conduct. Where, therefore a solicitor refused to leave with the Master a mortgage under which he claimed on behalf of a creditor, and the Master disallowed the

¹ *Jones v. Lewis*, 1 Cox, 190.

² See *Weymouth v. Boyer*, 1 Ves. J. 416, 426; *Parkes v. White*, 11 Ves. 200, 228; *Phillips v. Davies*, 7 Jur. 52, M. R.; *Man v. Ricketts*, 7 Beav. 93, 104; *Popple v. Hanson*, 5 De G. & S. 312. For form of order, see *Seton*, 86, No. 3.

³ *Attorney-General v. Corporation of Chester*, 14 Beav. 338.

⁴ *Seton*, 967.

claim as not being proved, the Court, on appeal, refused to interfere with the Master's finding, and made an order for costs against both the solicitor and client. Under the circumstances above stated, the Court gave the client, the creditor, a further opportunity of proving the claim, unless the solicitor should show that he acted under express instructions.¹

Where a defendant has the same interest as the plaintiff, but disapproves of the suit, he should distinctly repudiate it: if he does not do so, the bill may, in the event of the plaintiff not succeeding, be dismissed without costs as against him.²

In deciding the question of costs, the Court will frequently apportion them, so as to cause the costs of one part of the suit to fall upon one party, and those of another part to fall upon the other party. Thus, where a plaintiff claims several matters by his bill, and succeeds in establishing his right to a portion only of what he so claims, the Court will sometimes grant him a decree for that part of his case in which he is successful, with costs to be paid by the defendant; and dismiss the remainder of his bill with costs, to be paid by himself.³ So also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties may be allowed costs on issues found in their favor, and must pay on those against them.⁴

In tithe suits, where there are several defences, the Court will apportion the costs between the defendants; but if there is a common defence, they must be paid by the defendants generally.⁵

Sometimes, where no part of the bill is dismissed, but a decree is made upon the whole of it, the Court will order the costs of the suit, up to a certain period, to be borne by one party, and the remainder by another. Thus, in suits for specific performance, where a vendor does not deliver a complete abstract or make out his title until after the bill is filed, he will be liable to pay the costs of the suit, up to

1 *Brigham v. Smith*, 2 Cham. Rep. 462.

2 *Winthrop v. Murray*, 14 Jur. 302, 304. The report of S. C., in 8 *Hare*, 214, incorrectly states that the bill was dismissed with costs.

3 *Preece v. Seale*, 3 Jur. N. S. 711, V. C. W.; *Chinan v. Cooke*, 1 Sch. & Lef. 22, 43. For form of order, see *Seton*, 1133; and see *Seton*, 88, 89, 94.

4 *Prevost v. Bennett*, 2 Frl. 272.

5 *Edsall v. Peacock*, Johns. 216.

the time when he showed a good title.¹ And so, where the vendor established his title after a contest, upon a different ground from that in the abstract delivered, the Court decreed the costs of the inquiries as to the title, to be paid by the vendor;² but if new objections are taken, after the institution of the suit, the Court does not necessarily make the vendor pay the costs of the suit, up to the time of their removal.³

A purchaser whose vendor had died, and who had paid his purchase money partly to the vendor in his lifetime, and the balance to his administrator, brought an action to recover back the purchase money, when a bill for an injunction was filed, a good title was subsequently shewn; the purchaser, the defendant in the injunction suit, was ordered to pay the costs down to the hearing of the cause.⁴

In matters of account, also, the Court will frequently apportion the costs between the plaintiff and defendant. Thus, where a plaintiff, took a decree for an account against an executor, who had in his answer stated an account, which was found to be correct, the Court gave the costs of the suit up to the decree to the plaintiff, and the costs of the subsequent proceedings to the defendant: the reason of the distinction, apparently, being, that the executor had, before the bill was filed, been applied to for an account, but gave none,⁵ and so had rendered the suit necessary; but it was at the plaintiff's own risk that he proceeded with it, after the defendant had rendered a correct account by his answer. And where one of several residuary legatees carried on the suit against the wish of the others, after correct accounts had been rendered, the Court ordered all the costs subsequent to the hearing to be borne by his share.⁶

Where one of two partners denied the existence of a partnership, and a bill was in consequence filed against him, and by the evidence

1 *Sup. V. & P. 648; Townsend v. Champemourne*, 3 Y. & C. Ex. 505, 527; *Harford v. Purrier*, 1 Madd. 532, 538; *Seton*, 616; *Wilson v. Allen*, 1 J. & W. 611, 624; *Wynn v. Morgan*, 7 Ves. 202, 206; ——— *v. Collings*, 3 V. & B. 143, n.; *Lewin v. Guest*, 1 Russ. 325, 328; *Wilkinson v. Hartley*, 15 Beav. 183, 188; *Wilson v. Williams*, 3 Jur. N. S. 810, V. C. W.; *Grove v. Bastard*, 1 De G. M. & G. 69, 79; *Offen v. Harman*, 6 Jur. N. S. 487; 8 W. R. 129, L.J.J.

2 *Felder v. Higginson*, 3 V. & B. 142; see, however, *Carrodus v. Sharp*, 20 Beav. 56.

3 *Scovones v. Morrell*, 1 Beav. 251, 258; *Sidebotham v. Barrington*, 5 Beav. 261; *Freer v. Hesse*, 4 De G. M. & G. 495, 505; *Bridges v. Longman*, 24 Beav. 27.

4 *Van Wormer v. Harding*, 2 Cham. Rep. 199; and see *Gray v. Springer*, 5 Grant, 242; *Van Wagener v. Terryberry*, 5 Grant, 324; *Osborne v. Osborne*, 5 Grant, 619; *Forbes v. Connolly*, 5 Grant, 667; *Schofield v. Tummmonds*, 6 Grant, 568.

5 *Anon.* 4 Madd. 278; and see *Beames on Costs*, 7.

6 *Thompson v. Cliss*, 11 Beav. 475, 480.

aken in the cause the partnership was established, the Court gave the plaintiff the costs up to the hearing, and also the costs of a consent reference as to the fact of partnership, and beyond that refused the costs to either party.¹ And where a trustee set up an improper claim to the property, the subject of the trust, and a bill was filed to compel him to deliver up possession and account the Court charged him with the costs up to the hearing, reserving the consideration of interest and subsequent costs.² Where a legatee filed a bill charging the executors with neglect and improper conduct in the management of the estate, all of which were by the Master's report shown to be groundless, the executor's having managed the estate to the best of their ability, and the case in reality being such as should have been proceeded with by a summary application for an administration order, the Court, on further directions, ordered the next friend of the plaintiff to pay the executors their costs up to the hearing, not the costs of the decree, or of taking the accounts, or of subsequent proceedings, but directed the plaintiff to pay her own costs thereof.³ A legatee filed a bill against executors and another person, between whom and the executors it was charged, improper dealings had taken place with the estate. The charges so made were not sustained in evidence, and the plaintiff was therefore ordered to pay the costs of the defendants to the hearing, and allowed only costs of and subsequent to decree. And cross charges of improper conduct having been brought against the plaintiff by other legatees made parties to the suit, and not substantiated, the costs incurred in resisting such charges were directed to be paid by the parties making them.⁴ Where a conveyance is set aside as void against creditors, a sale ordered, and costs up to the hearing given against the defendants; these costs should be paid by the defendants immediately, where it is manifest the property is not sufficient to pay the creditors in full.⁵ Where an agent had neglected to account though repeatedly pressed to do so by his principal, he was ordered to pay the costs of a suit brought for an account up to the hearing, though the Court was satisfied that his neglect did not proceed from any dishonesty on his part, or from any intention to

1 *O'Lone v. O'Lone*, 2 Grant, 125.

2 *Fisher v. Wilson*, 2 Grant, 280.

3 *Moodie v. Leslie*, 12 Grant, 537.

4 *Miller v. McNaughton* 11 Grant, 308.

5 *Gill v. Tyrrell*, 11 Grant, 474.

withhold information from his principal¹ The next friend of infants filed a bill against the mother of the infants—their guardian appointed by the Surrogate Court, and her husband alleging certain acts of misconduct which were not established in evidence; and the accounts taken under the decree resulted in showing a balance of about \$22 in the hands of the defendants. The Court being of opinion that the suit had been instituted recklessly, and without proper enquiry, ordered the next friend of the plaintiffs to pay the costs of the defendants as between party and party.² An executor who obtains an order for the administration of his testator's estate, is not always entitled to the costs. An executor took out an administration order for the purpose of establishing a claim which he made against the estate, and of having it paid by sale of the realty; but he failed to prove his claim, and, on the contrary, a small balance was found against him. It appeared, also, that he had not kept proper books of account as executor; *Held*, that he should pay the costs of the suit.³

In like manner, where a bill is totally dismissed, the Court will sometimes apportion the costs to be paid by the plaintiff. Thus, in *Bruce v. Bainbridge*,⁴ where a bill was filed by a seller, for specific performance of the contract for sale, and the Master's report was in favour of the title, a case was sent to the Court of Common Pleas; and the certificate being against the title, the bill was dismissed with costs, only from the date of the Master's report.

Where defendants had set up in their answer several grounds of defence on which much evidence was gone into, and the Court without going into those defences, dismissed the plaintiffs' bill on a ground not argued at the bar, and which might have been taken by demurrer, it was held (*Esten, V.C. dissentiente*) that the defendants were notwithstanding entitled to the whole costs of their defence.⁵

Where costs are payable and receivable by the same party, the Court will, on motion, direct them to be set off one against the

¹ *Douglass v. Woodside*, 11 Grant, 375.

² *Hutchinson v. Sargent*, 17 Grant, 8.

³ *Sullivan v. Sullivan*, 16 Grant, 94.

⁴ *Sug. V. & P.* 648.

⁵ *Simpson v. Grant*, 5 Grant, 267.

other;¹ and where, in a cause, the costs are apportioned between the plaintiffs and the defendants, the Court will generally so arrange them, that they may be set off one against the other, and that the balance only shall be paid by the party from whom, upon setting off such costs, it shall appear to be due.² The Court will, also, where there are sums of money to be paid, as well as costs, arrange the demands of each, so as to do justice to all.³ Thus, in *Fell v. Lutwidge*,⁴ where the costs of the suit were thrown upon a trustee, on the ground of fraud, Lord Hardwicke allowed him to set off those costs against the premiums and other charges he had been at in obtaining a policy of insurance.

So, in a suit for the administration of assets, in which, according to the common course of the Court, all the parties are entitled to have their costs out of the fund, a party, who is a debtor to the estate, is not allowed to receive payment of them, whilst his debt remains unsatisfied; but the costs due to him will be ordered to be set off, *pro tanto*, against the debt due from him.⁵ And where a bill was dismissed with costs, so far as it sought to charge the separate estate of a married woman, who had not separately defended the suit, such costs were ordered to be set off against an amount found due from her husband.⁶

It is not the practice of the Court to set off costs of one suit against the costs, or costs and duty, due to the party to pay them from the person who is to receive them in another;⁷ unless the two suits are consolidated, so that one order can be made in both;⁸ and defendants who have been dismissed, and to whom costs are due from the plaintiff, have no lien for them on a fund in Court belonging to him.⁹

The practice at common law with respect to the set off of one defendant's costs against those of another for the benefit of the

1 *Cattell v. Simons*, 6 Beav. 304, 308; *Bryan v. Metropolitan Saloon Omnibus Company*, 4 Drew. 546. There is no set-off where the parties to the proceeding are not the same: *Jenner v. Morris*,

11 W. R. 943, V. C. K.

2 See, for forms of orders, *Seton*, 88, 89; and see *ib.* 96; *Taylor v. Popham*, 15 Ves. 72.

3 *Taylor v. Popham*, *ubi sup.*

4 *Barnard*, 319.

5 *Harmer v. Harris*, 1 Russ. 155, 157; *Nicholson v. Norton*, 7 Beav. 67; *Holworthy v. Allen*, 2 Bro. C. C. 17; 1 Coz, 202; and see, as to setting off costs of bankrupt executor, debtor to estate, *Samuel v. Jones*, 2 Hare 246; *Cotton v. Clark*, 16 Beav. 134; 16 Jur. 379.

6 *Wright v. Chard*, 4 Drew. 702.

7 *Wright v. Mudie*, 1 S. & S. 266; *Collett v. Preston*, 15 Beav. 458.

8 *Budge v. Budge*, 12 Beav. 335.

9 *Müller v. Pridden*, 3 Jur. N. S. 78, V. C. K.

plaintiff does not prevail in this Court; nor can a plaintiff set off costs payable by one defendant against that defendant's share of the joint costs of the defence in the same suit, all defendants being represented by the same solicitor.¹ Where the plaintiff's bill sought to enforce two judgments, one of which the Court held him not entitled to enforce, no costs were given to either party up to the hearing; the rule seems to be that where costs are to be set off against other costs, the Court will not give costs to either party.² On the dismissal of a bill costs were taxed to the defendants and execution issued against the plaintiff which was returned *nulla bona*. Two of the defendants, as administrators, held moneys, part of which would on distribution belong to the plaintiff, and which they now applied for leave to set off against the taxed costs,—but, under the circumstances, the motion was refused.³ A decree had been made in a cause giving the plaintiffs relief, and ordering the defendants to pay the costs which, however, were not paid. The plaintiffs appealed from a portion of the decree with which they were dissatisfied, which appeal, upon argument, was dismissed with costs to be paid to one of the respondents; thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the Court below to the plaintiffs, which was ordered accordingly.⁴

Where a party is entitled to his costs, but it has not been decided who ought ultimately to bear them, payment is often directed to be made out of a fund in Court, or by one of the parties to the proceedings, "without prejudice to the question how the same are ultimately to be borne."⁵ The absence, however, of these words, or words of a like meaning, from an order directing payment of costs out of a fund in Court, does not necessarily imply that the Court has decided that the fund out of which the costs are paid is that which must ultimately bear them; and costs paid out of a fund, under an order from which those words are omitted, may be directed to be recouped out of another fund which is primarily liable for that purpose.⁶ If the party ordered to pay the costs without prejudice, in the manner before described, neglects, at the

1 *Commercial Bank v. Elwood*, 1 Cham. Rep. 219.

2 *Cameron v. Bradbury*, 9 Grant, 67.

3 *Black v. Black*, 11 Grant, 270.

4 *B. U. C. v. Thomas*, 10 Grant, 366.

5 *Sheppard v. Sheppard*, 23 Beav. 129, 130.

6 *Seton*, 87, 93.

proper time, to apply with respect to such costs, he will not be allowed to reopen the question afterwards.¹

Where a party is entitled to costs, he should take care and apply for them at the hearing, or at any rate before the decree has been passed : as, after a decree has been passed, the Court will not give the costs of the suit to a party, although he was a mere trustee, and as such would have been entitled to them, as a matter of course, if asked for at the hearing.²

When costs are ordered to be taxed simply, it means as between party and party. If the costs are to be taxed as between solicitor and client, or if any costs, charges, and expenses, not strictly costs of suit, are to be allowed on the taxation, or any variation from a taxation as between party and party, is to be allowed, it should be expressed in the decree.³

Where costs are payable out of a fund in Court, they are ordered to be paid to the solicitor of the party ; but in other cases, they are always ordered to be paid to the parties themselves.⁴

Where it is intended that the costs of persons appearing at the hearing who are not parties to the record should be paid, their names must be specifically mentioned in the order : for a direction to pay the costs of all parties, only includes the costs of the persons parties to the record.

It may here be noticed that order 318 provides that "Where an order directs the plaintiff's costs to be taxed, and the Master finds that the suit is one within the jurisdiction of the County Court, he is not to tax any costs under the said direction, unless the order contains a declaration that in the opinion of the Court, the cause is a fit and proper cause to be brought in this Court instead of the County Court."

Before the order it was held that where the Master was directed by a decree to tax the costs of the suit, he had no jurisdiction to decline taxing them if he found that the suit might have been

¹ *Whalley v. Ramadge*, 3 L. T. N. S. 499, V. C. K.

² *Colman v. Sarrell*, 2 Cox, 204 : see also *Norris v. Norris*, 1 Cox, 183; *Kendall v. Marsters*, 2 De G. F. & J. 200 ; but see *Vincy v. Chaplin*, 3 De G. & J. 282.

³ *Seton*, 92.

⁴ *Ibid.* For form of order, see *Seton*, 90.

brought in the County Court.¹ When a plaintiff files a bill in this Court to foreclose a mortgage for a sum within the jurisdiction of the County Court, no costs will be allowed him, the fact that the defendant is resident in a county other than where the land is situate will not vary this rule.² Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs if it appears that there is any encumbrance beyond that sum.³ Where the plaintiff's claim on the premises together with the amount of a subsequent mortgage exceeded \$200, it was held to be beyond the jurisdiction of the County Court. *Semble*. The necessity for an order for substitutional service, would appear to be sufficient reason for filing a bill in this Court, which might otherwise have been filed in the County Court.⁴ The act giving to County Courts equitable jurisdiction in relation to mortgages when the sum does not exceed \$200 does not apply when the defendant is resident out of the jurisdiction;⁵ nor where all the defendants do not reside in the County.⁶

Costs out of the Fund.

In the last section some of the principles have been pointed out by which the Court is governed in awarding the cost of a suit, in cases in which, the subject of litigation not being a fund or estate under the administration of the Court, the costs must necessarily be paid by one party to another. It is now proposed to consider those cases in which an estate, whether real or personal, being the subject of litigation, the court will order the costs of the suit, or those of some of the parties to it, to be defrayed out of the fund or estate.

As a general rule, wherever an estate or fund is administered by the Court, the costs of all necessary and proper parties to the proceedings are a first charge; and must be defrayed thereout, before the claims of the persons beneficially entitled thereto are satisfied.⁷ But the costs only of those proceedings which were, in their origin, properly directed for the benefit of the estate, will be directed to be thus paid; and the costs of any unnecessary and useless proceed-

¹ *McLeod v. Millar*, 12 Grant, 194.

² *Hyman v. Roots*, 11 Grant, 202.

³ *Lawson v. Fitzgerald*, 9 Grant, 371.

⁴ *Hare v. Rose*, 2 Ves. 8, 558; *Ford v. Earl of Chesterfield*, 21 Beav. 426; *Barnwell v. Iremonger*, 1 Dr. & Sm. 256, 758; and see *Attorney-General v. Lawes*, 8 Hare, 32. As to costs, generally, in suits for administration of assets, see *Morgan & Davy*, 100, et seq.

⁵ *Connell v. Curran*, 1 Cham. Rep. 11.

⁶ *Seath v. Mellroy*, 2 Cham. Rep. 93.

⁷ *McLeod v. Millar*, 12 Grant, 194.

ings must be paid by the person at whose instigation they were taken.¹

It may be mentioned here, that costs of a litigation in the Court of Probate will be postponed to the costs of administration in the Court of Chancery.²

Trustees,³ agents, and receivers, accounting fairly, and paying their money into Court are entitled to their costs out of the estate, as a matter of course;⁴ and the same rule extends to personal representatives;⁵ to whom, as they can only obtain complete exoneration by having their accounts passed in the Court,⁶ the Court will give every opportunity of exonerating themselves, by passing their accounts at the expense of the estate. The rule is not confined to cases in which they are brought before the Court as defendants: it being a general principle, that a trustee has a right to the protection of the Court, in the execution of his trust; he is therefore, entitled to his costs, whether he comes before the Court as plaintiff or defendant, unless the act required to be done leads to no responsibility, or his motive is obviously vexatious.⁷

Where trustees filed a bill for the purpose of having the trusts of the deed appointing them carried into execution without suggesting the existence of any difficulty in the way of their winding up the affairs of the estate, the Court refused them their costs of the suit.⁸ In an administration suit it appeared that the step-father of the children of the deceased, and who had the care of such child, had been sued for the child's board while at school, her mother being a creditor of the estate, and neither she nor her husband having any funds to pay for such board, while there were funds applicable there-

1 *Bertlett v. Wood*, 9 W. R. 817, L. C.; and *Westover v. Chapman*, 1 Coll. 181, 188.

2 *Major v. Major*, 2 Drew. 281.

3 As to costs of trustees generally, see *Lewin on Trusts*, 668, *et seq.*; *Hill on Trustees*, 571, *et seq.*; and of trustees, executors, and administrators, *Morgan & Davey*, 288, *et seq.*

4 *Attorney-General v. City of London*, 1 Ves. J. 243, 246; 3 Bro. C. C. 171; *Courrend v. Hammer*, 9 Beav. 3.

5 *Rushley v. Masters*, 1 Ves. J. 206; *Samuel v. Jones*, 2 Hare, 246; 7 Jur. 845. The rule applies to the executors of a defaulting trustee who account fairly: *Haldenby v. Spoforth*, 9 Beav. 195; *Horne v. Shepherd*, 3 Jur. N. S. 806, V. C. S.; but see *Lyse v. Kingdon*, 1 Coll. 184, 189; 8 Jur. 418.

6 See *Knatchbull v. Fearnhead*, 3 M. & C. 122; *Hay v. Bowen*, 5 Beav. 610, 616; 6 Jur. 1119.

7 *Curtis v. Condlar*, 6 Madd. 123; *Poole v. Pass*, 1 Beav. 600, 604; *Holford v. Phipps*, 3 Beav. 424, 440; 4 Beav. 476; *Whitmarsh v. Robertson*, 1 Y. & C. C. 716, 717; 6 Jur. 921, 923; *Noble v. Meymott*, 14 Beav. 471. A trustee is not entitled to his costs on the mere ground that he acted on the opinion of counsel; see *Devey v. Thornton*, 9 Hare, 232; *King v. King*, 1 De G. & J. 663, 666, 671, 674; 4 Jur. N. S. 721; *Re Knight's Trusts*, 27 Beav. 45, 49; 5 Jur. N. S. 523; see, however, as to costs of a bankrupt executor or trustee, *Samuel v. Jones*, 2 Hare, 246; 7 Jur. 845; *Cotton v. Clark*, 16 Beav. 134; 16 Jur. 879; *Turner v. Mullineux*, 9 W. R. 252, V. C. W.

8 *Cummings v. Macfarlane*, 2 Grant, 157.

to: it was held that the step-father should be allowed the costs of such suit.¹ In an administration suit the widow of the testator had made a claim for dower which had been allowed; and upon an appeal from that decision the Court of Appeal reversed the judgment of the Court below, in so far as it had allowed the claim for dower, but gave no directions as to the payment of the costs of the appeal. The appellants having paid their own costs of the appeal, this Court upheld the finding of the Master in allowing them such costs out of the estate.² Under an administration order obtained by a creditor the executors admitted a certain sum money in hand, part of which they objected to pay into Court, on the ground that it had been paid by them to their solicitor for watching and protecting the interests of the estate, upon claims of creditors brought into the Master's office. It was held that they were entitled to do so, as it is the duty of executors to protect and look after the interests of the estate upon those enquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character.³ The report in an administration suit found £1,403 chargeable against an executor. Of this sum £1,247 was for the price of land claimed and received by the executor, the testator's son as heir, and his claim to this had long been acquiesced in by the other parties interested till held otherwise in this suit, when this purchase money was declared to pass, under the testator's will, to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property, left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £34. Under the circumstances the executor was allowed his costs, as of an administration, out of the estate, and was not charged with interest on the balance in his hands, which he was required to pay into Court within a month after deducting therefrom his share of the estate as legatee.⁴ Executors are usually entitled to their costs as between solicitor and client out of the estate — incurred any other costs, charges, and expenses—and if they have in addition to the costs of the suit in the administration of the estate, on this fact being stated to the Court, but not otherwise, an inquiry will be directed, and the Master will be authorized to include them in his account. Where

1 *Menzies v. Ridley*, 2 Grant, 544.

3 *Re Babcock's Estate*, 8 Grant, 400.

4 *Blain v. Terryberry*, 12 Grant, 221.

2 *Ibid.*

an executrix applied against the Master' report, and the appeal was allowed without costs, it was held that she could not on further directions claim the costs of the appeal out of the estate.¹

A trustee, fairly instituting a suit for the direction of the Court with regard to the trust, will not only be entitled to his own costs but any person made a party to the suit, for his protection, will also be ordered his costs from the fund. Thus, where a bill was filed by trustees, for the direction of the Court, as to the application of a trust fund, in the course of which a dispute arose between the two defendants, whether one of them was illegitimate, and it was found that he was legitimate, the other was allowed his costs out of the trust fund.² The Court considers a trustee entitled to its protection and direction in the execution of his trusts, and will not only never call upon him to pay the costs, unless he refuses to act merely from caprice or obstinacy,³ but will give him his costs out of the trust property, although it appears, in the result, that he might safely acted without suit.⁴ In *Low v. Carter*,⁵ Lord Langdale, M. R., said: "I cannot conceive that anything could be more hard, than that executors, who are called on to administer estates, where there are doubtful questions arising on the will, and who can be exonerated only by having their accounts passed in a Court of Equity, should be deterred from coming to this Court, by being visited with the costs of the proceedings."

Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred,⁶ A testator devised his real estate to his widow, and in the event of her re-marriage to children. The widow afterwards filed a bill against the executors, charging mal-administration, which was disproved, and on the contrary it was shewn that they had benefited the estate by their management of it: and the Master having found that the personal assets were

¹ *Story v. Dunlop*, 13 Grant, 375.

² *Hicks v. Wrench*, 6 Madd. 93.

³ *Re Woodburn's Trusts*, 1 De G. & J. 333; 3 Jur. N. S. 799; *Re Cater*, 25 Beav. 361; *Re Knight's Trusts*, 37 Beav. 45; *Re Foligno*, 32 Beav. 131.

⁴ *Henley v. Philips*, 2 Atk. 49; see also *Taylor v. Glanville*, 3 Madd. 176.

⁵ *Low v. Carter*, 1 Beav. 426, 430.

⁶ *Sunley v. McCrae*, 2 Cham. Rep. 231.

insufficient to discharge the remaining liabilities, the Court directed the executors to receive the costs out of the estate; that a competent portion of the real estate should be sold, and that the testator's children should be made parties to the suit in the Master's office for the purpose of retaking the accounts, if desired by the guardian—they not being bound by the accounts already taken—and under the circumstances refused the widow her costs.¹ Where one of the legatees was absent from jurisdiction, and the executors had been unable to discover him; this was *held*, a sufficient ground for the executors coming to the Court to obtain an administration of the estate.²

Where, however, the act required to be done by a trustee, leads to no responsibility, or his motive is obviously vexatious³ he will not be allowed his costs. Thus, where trustees under a will refused to pay a legacy to the assignees of a bankrupt, merely because the bankrupt himself had set up a claim to it, Sir John Leach, M.R., refused them their costs of the suit, because the case was too clear to admit of a doubt; but as they might have acted from mere ignorance, and not from any improper motive, he would not make them pay the costs of the plaintiff, although he deprived them of their own costs.⁴ So, where a person having in his hands a sum of money belonging to an infant, instituted a suit, to have that sum secured for the benefit of the infant, though there was a trustee of a settlement, to whom it ought to have been paid, and who was willing to receive it, Lord Gifford, M.R., refused to allow him his costs out of the fund.⁵

An executor or administrator has no right to file a bill merely to obtain an indemnity, by passing his accounts under the decree of the Court. There must be some real question to submit to the Court, or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them. And if it shall appear that his conduct has been *mala fides* or unreasonable, he will be ordered to pay the costs of the defendant.⁶ But an exe-

¹ *Norris v. Bell*, 9 Grant, 23.

Re Wade 18 Grant, 485.

² *Curtis v. Candler*, 6 Madd. 123.

³ *Knight v. Martin*, 1 R. & M. 70; and see *Angier v. Stannard*, 3 M. & K. 566, 572; *Campbell v. Home*, 1 Y. & C. C. 664, 670; 7 Jur. 365; *Re Primrose*, 23 Beav. 500; 3 Jur. N. S. 366.

⁵ *Ellis v. Ellis*, 1 Russ. 248. In general, where a trustee, through his neglect or obstinacy, occasions the suit, he will be ordered to pay the costs of it.

⁶ *White v. Cummins*, 3 Grant, 602.

cutor or trustee will sometimes be entitled to his costs in a suit for administration notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach.¹ A trustee having refused to allow his name to be used as plaintiff, was refused his costs of defence, although no blame attached to him in other respects.² In case a creditor brings an administrative suit after being informed that there are no assets applicable to the payment of his claim, if the information appear by the result to have been substantially correct, he may have to pay the costs of the suit.³

Although trustees, and other persons standing in that character, are as we have seen, generally held intitled to their costs out of the estate, yet they will not be permitted unnecessarily to burden the fund, by costs which they might have avoided; they must, therefore, as a general rule, institute or defend a suit jointly; and if they sever, they will be allowed only one set of costs:⁴ except in some cases where there is a special reason justifying their severance;⁵ but where the severance is occasioned by the default or misconduct of one of two trustees, and only one set of costs is allowed, it is usually ordered to be paid to the innocent trustee.⁶ Where the whole of the costs are not given to one trustee, the apportionment is in general left to the Taxing Master.⁷ Upon the same principle, a trustee will, where he might have paid the trust fund into Court, under the Trustee Relief Acts, be allowed only the costs to which he would have been entitled, if that course had been adopted.⁸ He may, however, institute a suit, where the circumstances of the case are such that he is entitled to complete discharge from the trusteeship.⁹

1 *Weard v. Gable*, 8 Grant, 458.

2 *Ellis v. Ellis*, 7 Grant, 102.

3 *City Bank v. Scatcherd*, 18 Grant, 185.

4 *Farr v. Sheriffe*, 4 Hare, 528; 10 Jur. 630; *Hodgson v. Cash*, 1 Jur. N. S. 864; and see *Woods v. Woods*, 5 Hare, 229, 231; *Attorney-General v. Cuming* 2 Y. & C. C. C. 139, 156.

5 *Reade v. Sparkes*, 1 Moll. 8; *Nicholson v. Falkner*, 3b. 555; *Gaunt v. Taylor*, 2 Beav. 346; 2 Hare, 413, n.; *Aldridge v. Westbrook*, 4 Beav. 212; *Wiles v. Cooper*, 9 Beav. 298; *Kampf v. Jones*, C. P. Coop. 13; *Cummins v. Bromfield*, 3 Jur. N. S. 657, V. C. W.; *Shaw v. Johnson*, 9 W. R. 629, V. C. K.; and see, on this subject, *Lewin on Trusts*, 650; *Hill on Trustees*, 573; *Morgan & Davey*, 88.

6 *Webb v. Webb*, 16 Sim. 55; *Hughes v. Key*, 20 Beav. 395; *Prince v. Hine* (No. 2), 27 Beav. 345; and see *Birks v. Micklethwait*, 33 Beav. 409; 10 Jur. N. S. 308, where two sets of costs had been allowed.

7 *Courne v. Humphrey*, 26 Beav. 402; 5 Jur. N. S. 615; *Attorney-General v. Wyville*, 28 Beav. 464.

8 *Wells v. Maldon*, 31 Beav. 48; 8 Jur. N. S. 249.

9 *Barker v. Paile*, 2 Dr. & Sm. 340; 11 Jur. N. S. 496.

A trustee who severed in his defence because his co-trustee had refused to act in conjunction with him in the management of the estate, was, under the circumstances, refused his costs.¹

The trustees ought not to place themselves in such a position that their interests conflict with their duty:² therefore, where a solicitor is a trustee or executor, he will only be allowed his costs out of pocket,³ and will not, in the absence of any express provision in the instrument creating the trust, be entitled to charge for professional business transacted on behalf of the trust;⁴ and even such a clause will not entitle him to charge for business which falls to the duty of an executor or trustee to transact.⁵

The partner of a solicitor, who is a trustee, is also only entitled to his costs out of pocket, for business transacted by him on behalf of the trust:⁶ unless he has acted for his own benefit alone.⁷

It is no part of the business or employment of a trustee to assist other parties in suit relative to the trust property: if, therefore, the trustee acts as solicitor for such other parties, such business or employment is not any business or employment of the trustee, and the rule that a solicitor who is a trustee is to be allowed only his costs out of pocket, does not apply; and where he acts both as solicitor for himself and for other parties, his costs will be disallowed to the extent only to which they have been increased by his being a party.⁸ The exception, however, only applies to business done by the solicitor trustee in prosecuting or defending proceedings in Court.⁹

¹ *Gibson v. Annis*, 11 Grant, 481.

² Per Lord Cranworth, in *Broughton v. Broughton*, 5 De G. M. & G. 160, 164: 1 Jur. N. S. 965; 8 C. 2 Sm. & G. 422; see also *Crosskill v. Bower*, 32 Beav. 86: 9 Jur. N. S. 267.

³ *Robinson v. Pett*, 3 P. Wms. 249; *Moore v. Froud*, 3 M. & C. 45, 51; *Mew v. Jones*, 1 McN. & G. 668, n. (d); *York v. Brown*, 1 Coll. 280: 8 Jur. 567; *Broughton v. Broughton*, *ubi sup.*; *Selater v. Cottam*, 3 Jur. N. S. 630, V. C. K.; *Pollard v. Doyle*, 1 Dr. & Sm. 319; *Gomley v. Wood*, 3 Jo. & Lat. 678, 688; *Lincoln v. Windsor*, 9 Hare, 168; *Pince v. Beattie*, 9 Jur. N. S. 1119: 11 W. R. 979, V. C. K.

⁴ *Broughton v. Broughton*, *ubi sup.*; *contra*, *Moore v. Froud*, *ubi sup.*; *Re Sherwood*, 3 Beav. 338, 341; *Lewin on Trusts*, 218; *Hill on Trustees*, 699; *Seton*, 770; *Morgan & Davey*, 279, *et seq.*; see also *Price v. McBeth*, 10 Jur. N. S. 679: 12 W. R. 818, V. C. S., as to costs of a solicitor mortgagee.

⁵ *Harbin v. Darby*, 28 Beav. 326: 6 Jur. N. S. 906.

⁶ *Collins v. Carey*, 2 Beav. 128; *Christophers v. White*, 10 Beav. 523; *Lyon v. Baker*, 5 De G. & S. 622. As to costs of the town agent of the trustee, see *Burge v. Brutton*, 2 Hare, 378, 379: 7 Jur. 988.

⁷ *Clack v. Carlon*, 7 Jur. N. S. 441.: 9 W. R. 568, V. C. W.

⁸ *Craddock v. Piper*, 1 McN. & G. 684, 679; *Fraser v. Palmer*, 4 Y. & C. Ex. 515; *Broughton v. Broughton*, *Pince v. Beattie*, *Lincoln v. Windsor*, and *Harbin v. Darby*, *ubi sup.*

⁹ *Lincoln v. Windsor*, and *Broughton v. Broughton*, *ubi sup.*

A similar rule applies to the case of an auctioneer, who, if a trustee, will not be allowed his commission for selling part of the trust estate.¹

The rule, however, is not inflexible; and under very special circumstances, the trustee may be allowed compensation for his time and trouble, in addition to his costs out of pocket.²

It has been said that trustees and personal representatives brought into Court, will not be deprived of their costs, although they make a claim for their own benefit and fail, provided they do so "by way of submission";³ but where a trustee has a private interest of his own, separate and independent from the trust, and obliges the *cestui qui trust* to come into this Court, merely to have the point relating to his own private interest determined at the expense of the trust; this is such vexatious behaviour, on his part, that he will be decreed to pay the whole costs of the suit.⁴ Upon this ground, where, on a bill filed for a residue, the defendant, the executor, by his answer stated declarations of the testatrix that her legatees should have no more than their express legacies, and hoped to prove that the surplus was intended for himself as executor, he was made to pay the costs for thus insisting upon the surplus.⁵

As the Court will not allow trustees to take advantage of the rule of the Court in their favor, to obtain a determination upon their own rights, so it will not tolerate their attempting to defeat the claims of their *cestui qui trust*, by setting up an improper defence. Therefore, where the trustees of an estate, bequeathed to them in trust for a charity, insisted that the plaintiffs had, under a clause in the will of the founder, (by which it was declared that, if the heirs at law should dispute the will, they should forfeit certain annuities thereby bequeathed to them,) forfeited their annuities by filing the bill, which prayed that the trust for the charity might be declared a resulting trust, or, in the alternative that they might have the arrears of their annuity, Lord Talbot

1 *Kirkman v. Booth*, 11 Beav. 273; *Matthison v. Clarke*, 3 Drew. 3. An auctioneer trustee may, however, be allowed commission under the terms of the deed creating the trust: *Douglass v. Archbutt*, 2 De G. & J. 148; 4 Jur. N. S. 315.

2 *Bainbridge v. Blair*, 8 Beav. 588, 597: 9 Jur. 765; and see *Marshall v. Holloway*, 2 Swanst. 453, 463; *Seton*, 770; *Lewin on Trusts*, 216. Our Statute alters this, as already explained ante.

3 *Rashley v. Masters*, 1 Ves. J. 205.

4 *Henley v. Phillips*, 3 Atk. 43.

5 *Bayley v. Powell*, Prec. in Ch. 92; S. C. nom. *Bayley v. Powell*, 2 Vern. 361; *Bruin v. Knott*, 12 Jur. 616, V. C. E.

ordered them to pay the costs out of their own pockets, and not out of the trust estate.¹ And so, if a trustee states a trust to be different from what it actually is, the Court will deprive him of his costs, although he does it not to benefit himself, but another. Thus where the defendant, who was the trustee of a marriage settlement upon the question between the husband and wife whether the wife, who was separated from her husband and lived in a state of adultery, was entitled, under the settlement, to the dividends of a sum of stock to her separate use, insisted, contrary to the fact, that it was the intention of the parties that a provision for the separate of the wife should be introduced into the settlement, Lord Rosslyn thought there was ground to deprive the trustee of her costs.²

Trustees will, also, be deprived of their costs if they claim more than they are entitled to : therefore, where the trustees of a charity insisted by their answer, that there was £800 due to them from the charity, but it was found that £180 only was due to them, Lord Cowper refused them their costs, though the balance was in their favour.³

It may be noticed, however, that a disallowance of credit, honestly claimed by an executor, though he is mistaken, is not enough to disentitle him to costs ; therefore, where an executor's account was surcharged by the amount of a credit taken for the proportion of an annuity, payable by the testator, during his life, to the executor, but which was not apportionable, the mistake was not considered by Sir Anthony Hart, L. C., as a ground to deprive the executor of his costs.⁴

If persons, standing in the situation of trustees, by their neglect or misconduct occasion the suit, they will be deprived of their costs out of the estate ;⁵ although the trust instrument contain the usual clause authorizing the trustees to reimburse themselves any expenses they may incur ;⁶ but mere neglect of duty, as, for instance, the omission to invest balances, if unaccompanied by

1 *Lloyd v. Spillet*, 3 P. Wms. 344, 346 ; and see *S. C. Lloyd v. Spillet*, 2 Atk. 143.

2 *Ball v. Montgomery*, 2 Ves. J. 191, 199.

3 *Attorney-General v. Brewers' Company* 1 P. Wms. 376 ; *Dawson v. Parrot*, 3 Bro. C. C. 235.

4 *Bennett v. Going*, 1 Moll. 529.

5 *O'Callaghan v. Cooper*, 5 Ves. 117, 128 ; *England v. Downes*, 6 Beav. 279 ; *Howard v. Rhodes*, 1 Keen, 581 ; *Fyfe v. Arbuthnot* 3 Jur. N. S. 651, L. C. ; *Aylmer v. Winterbottom*, 4 Jur. N. S. 19, V. C. W. ; and see *Legg v. Mackrell*, 2 De G. F. & J. 551 ; 1 Giff. 165 ; 5 Jur. N. S. 1154 ; see also *Lewin on Trusts*, 665 ; *Hill on Trusts*, 575, *et seq.*

6 *Hide v. Haywood*, 2 Atk. 125 ; *Hill on Trusts*, 593.

fraud, is not such misconduct as to disentitle them to their general costs of the suit; although it may subject them to the costs of so much of the suit as was occasioned by neglect.¹ Although, in general, a trustee committing a breach of trust, which may render an application to the Court necessary, will be deprived of his costs, yet, where the breach of trust consisted of the improper application of a small part of the trust fund, which was promptly offered to be restored, and the suit was for other purposes of the trust, there being no imputation against the trustee, he was held not to be disentitled to his costs.²

Where executors had improperly dealt with a portion of the funds of an estate by allowing one of their number to retain it in his hands at a low rate of interest, the Court refused them their costs prior to a decree; and costs were given to the plaintiff notwithstanding fraud was charged against the executors, which was not established under the circumstances of the case.³ Where an executor had retained money in his hands unemployed, for which on passing his accounts he was charged with interest and rests. It was held, notwithstanding, that having reference to the condition of the estate, and the facts of the case, he should be allowed his commission and costs of the suit.⁴ A trustee of lands for the payment of debts, paid the debts without exercising the power of sale for that purpose, and took a release from the *cestuis que trust* to himself, which release was held void, and an account directed. Under the circumstances, neither fraud nor neglect to account having been established against the trustee, who had accounted as such in the Master's office, and the property, or the produce thereof being forthcoming for the benefit of the estate, the Court directed the trustee to receive his subsequent costs, as in ordinary cases, as between solicitor and client.⁵

In the cases above referred to, the Court has contented itself with marking its disapprobation of the conduct of the trustee or personal

1 *Heighington v. Grant*, 1 Phil. 600, 604; *Tebbi v. Carpenter*, 1 Madd. 290, 307; *Bennett v. Atkins*, 1 Y. & C. Ex. 247, 249; *Fozier v. Andrews*, 2 Jo. & Lat. 199; *Cotton v. Clark*, 16 Beav. 134; 16 Jur. 879; *Holgate v. Howarth*, 17 Beav. 259; *Knott v. Cottee*, 16 Beav. 77; 16 Jur. 753; *Bate v. Hooper*, 5 De G. M. & G. 338; and see, *contra*, *Parrot v. Treby*, Prec. in Ch. 254; *Seers v. Hind*, 1 Ves. J. 294; *Rocke v. Hart*, 11 Ves. 58, 61; *Mosley v. Ward*, ib. 581; *Ashburnham v. Thompson*, 13 Ves. 402, 404.

2 *Fitzgerald v. Pringle*, 2 Moll. 534; see also *Hewett v. Foster*, 7 Beav. 343; *Royds v. Royds*, 14 Beav. 54.

3 *Ashbaugh v. Ashbaugh*, 10 Grant, 433.

4 *Gould v. Burritt*, 11 Grant, 523.

5 *Hope v. Beard*, 10 Grant, 212.

representative, by withholding from him his costs, to which he would otherwise have been entitled out of the fund. It frequently happens, however, that the Court will go further, and will not only deprive the trustee or representative of his costs, but will compel him to pay the costs of the suit out of his own pocket; and it may be stated, as a general rule, that if any particular instance of misconduct, or a general dereliction of duty in a trustee, or even his mere caprice and obstinacy, is the immediate cause of a suit being instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behaviour has occasioned.¹ Upon this principle, where an executor, directed to lay out the testator's personality in the funds, unnecessarily kept large balances in his hands, and resisted the payment of debts by false pretences of outstanding demands, he was charged with the costs.² And where an executor retained a balance in his hands longer than was necessary to answer contingencies, he was ordered to pay interest and costs; though it appeared that he had always kept a sum ready at his bankers to defray the amount.³ A trustee who has occasioned the suit by refusing or neglecting to furnish proper accounts when requested, will be ordered to pay the costs of the suit;⁴ and where an executor obtained from a legatee a release from a legacy, for which no consideration was given, he was ordered to pay the costs of the suit instituted to set aside such release.⁵

It is the duty of a trustee to use reasonable diligence to have the accounts of the trusts ready, and to render them within a reasonable time after they have been asked for, on behalf of the *cestuis que trustent*; and where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of the suit up to the hearing.⁶

1 *Lewin on Trusts*, 666; *Hill on Trustees*, 579 *et seq.*; *Attorney-General v. Hobart*, Rep. t. Finch, 259; *Haberdasher's Company v. Attorney-General*, 2 Bro. P. C. ed. Toml. 370; *Pinfold v. Bouch*, 4 Hare, 271; *Thorby v. Yeats*, 1 Y. & C. C. C. 433; 6 Jur. 939; *Lyse v. Kingdon*, 1 Coll. 184, 189; 8 Jur. 418; *Hampshire v. Bradley*, 2 Coll. 34, 41; *Attorney-General v. Gibbs*, 1 De G. & S. 156, 161; *Birmin v. Pulham*, 2 De G. & S. 99, 101; *Marshall v. Sladden*, 4 De G. & S. 463; *Warter v. Anderson*, 11 Hare, 301; *Attorney-General v. Murdoch*, 2 K. & J. 571; *Price v. Leadon*, 21 Beav. 506; *Springett v. Dawwood*, 3 Giff. 521; 7 Jur. N. S. 93; *Dobson v. Pattinson*, 3 Jur. N. S. 1202, V.C.S.; *Boynston v. Richardson*, 31 Beav. 340; *Wroe v. Seed*, 4 Giff. 425; *Smith v. Bolden*, 33 Beav. 362.

2 *Crackell v. Bethune*, 1 J. & W. 556; see also *Mosley v. Ward*, 11 Ves. 581; *Pietz v. Stacey*, 4 Ves. 620, 623.

3 *Franklin v. Frith*, 3 Bro. C. C. 433; *Tickner v. Smith*, 3 Sm. & G. 42.

4 *Boynston v. Richardson*, 31 Beav. 340; *Kemp v. Burn*, 4 Giff. 348; 9 Jur. N. S. 375; *Re King, Gilbert v. Lee*, 13 W. R. 1012, M. R.

5 *Horsley v. Chaloner*, 2 Ves. S. 83, 85.

6 *Randall v. Burrocces*, 11 Grant, 366.

It has also been held that if executors make an unfair appraisal, and otherwise misbehave themselves in their trust, they will be liable to costs.¹ And where trustees kept possession of an estate from their *cestui qui trust*, whom they considered a lunatic, (but who, although eccentric when he was drunk, was not insane,) upon a bill filed by the supposed lunatic they were ordered to pay the costs of the suit; although it did not appear that they had acted from any corrupt motive, but were merely, as they considered, protecting the property for the benefit of those in remainder.²

So also, where the suit has been occasioned by a breach of trust, the trustees will be compelled to pay the costs; thus, where trustees, with the privity of the wife, sold out stock which had been settled to her separate use, and paid the proceeds to the husband, taking his bond of indemnity, and the husband afterwards died insolvent, whereupon the trustees replaced the stock: upon a bill filed by the widow and children to have the fund secured, the trustees were considered as having caused the suit by their breach of trust, and were ordered to pay the widow the amount of the dividends from the husband's death, with the costs of the suit.³

In like manner, where a trustee, mistaking his power, sold stock without authority, and, with the produce, purchased land, without having the power to do so, he was ordered to replace the stock and to pay the costs.⁴ And where, by mistake, the fund had been distributed among the wrong persons, the trustee was ordered to pay the costs of a suit to compel him to replace it:⁵ although the distribution had been made under the advice of counsel;⁶ and where the trustee of a legacy, which had been invested in stock, authorized another person, who was supposed to be entitled to the management of it, to sell it out and receive the proceeds, it was held that the trustee was answerable for the stock, and he was ordered to pay the costs: although the legatee, not knowing that the legacy had ever been invested or sold out, had dealt with such other person as the person accountable for the money.⁷

¹ *Sheppard v. Smith*, 2 Bro. P. C. ed. Toml. 372.

² *Brown v. How*, Barnard, 354; and see *Caffrey v. Darby*, 6 Ves. 488, 497; *Curtis v. Robinson*, 3 Beav. 242.

³ *Whistler v. Newman*, 4 Ves. 129, 145.

⁴ *Earl Poulet v. Herbert*, 1 Ves. J. 296.

⁵ *Eaves v. Hickson*, 30 Beav. 135; 7 Jur. N. S. 1297.

⁶ *Boulton v. Beard*, 3 De G. M. & G. 608, 611; and see *Devey v. Thornton*, 9 Hare, 232; *Foster v. Dawber*, 6 W. R. 47 V. C. K.; *Bullock v. Wheatley*, 1 Coll. 130, 135.

⁷ *Adams v. Clifton*, 1 Russ. 297, 300.

It seems that, in order to constitute such misconduct as will induce the Court to visit trustees with costs, it is not necessary that there should have been misfeasance on the part of the trustee: simple nonfeasance, where it has been productive of mischief to the trust estate, will be sufficient. Thus, where the trustees of a charity although they were not guilty of any corruption, had been extremely negligent in their trust, Lord King held, that they ought to be punished with some of the costs.¹ So, also, where an executor omitted to bring an action to recover a bond debt, he was ordered to pay the costs of taking the accounts.² And where two executors had kept money of their testator in their hands longer than the exigencies of the affairs required, and were consequently ordered to pay the amount with interest, and one became insolvent, the Court held each of them to be liable for the whole costs.³

In many cases, also, if there is misconduct on the part of a trustee or personal representative in the course of the cause, the Court will compel him to pay the costs of the suit out of his own pocket. Thus, a trustee will be fixed with costs if he persists in proceeding with the suit after it has become unnecessary;⁴ or if he wilfully mistakes the accounts;⁵ or if, being indebted to the trust estate, he resists the account and claims a balance;⁶ or if, by chicanery, he keeps the *cestui qui trust* from a true knowledge of the accounts, or even if he has kept the accounts in a very confused manner.⁷ An executor, also, will be liable to costs, if he denies assets and the contrary is provided against him.⁸ Where, however, he has the executor of an executor, and the estates of the two testators had been so blended as to create confusion, he was not ordered to pay costs: though it appeared he had assets sufficient to pay the plaintiffs' debt.⁹ And wherever the answer of an executor or other trustee is falsified by proof, and he appears to have acted from fraudulent motives, he will be made to pay the costs.¹⁰ So, if a corporation, being trustees for a charity, suppress or conceal evidence relating to

1 *East v. Ryal*, 2 P. Wms. 284; see also *Haberdasher's Company v. Attorney-General*, 2 Bro. P. C. ed. Toml. 370; *Attorney-General v. Hobert*, Rep. t. Finch. 250.

2 *Lowson v. Copeland*, 2 Bro. C. C. 156.

3 *Littlehales v. Gascoyne*, 3 Bro. C. C. 73; *Wros v. Seed*, 4 Giff. 425.

4 *Campbell v. Campbell*, 2 M. & C. 25, 30.

5 *Sheppard v. Smith*, 2 Bro. P. C. ed. Toml. 372; and see *Flanagan v. Nolan*, 1 Moll. 84.

6 *Eglin v. Sanderson*, 3 Giff. 434; 8 Jur. N. S. 329.

7 *Avery v. Osborne*, Barnard, 349; *Norbury v. Calbeck*, 2 Moll. 461.

8 *Sandys v. Watson*, 2 Atk. 80; *Lodge v. Pritchard*, 4 Giff. 294; 9 Jur. N. S. 982.

9 *Sandys v. Watson*, *ubi sup.*

10 *Vaughan v. Thurston*, Colles. P. C. 175, see also *Mallabar v. Mallabar*, Ca. t. Talb. 78.

the charity, they will be held liable to the costs of the suit.¹ And if a trustee, by his answer, sets up objections to his performance of his trust, which, he does not substantiate, he will be made to pay the costs.²

Although a personal representative, or other trustee, who misconducts himself in his trust will be liable to pay the costs of the suit the rule will be qualified where, though his conduct has been irregular, no loss has been incurred to the estate, and his motive has not been corrupt.³

It has also been held, that a slight instance of misconduct, in one particular point, will not fix a trustee with the costs: thus, where, by an order, made by consent several years before, a trustee had been ordered to pay £200 into Court, but had not done it, and, as an excuse for his disobedience, alleged that the plaintiffs did not serve him with the order, or take any step to have it executed, and that he understood they were dissatisfied with it, and intended to try to have it varied, the Court charged him with interest on the £200, but was of opinion that it was not a case to deprive the defendant of his costs.⁴

In *Hall v. Hallet*,⁵ Lord Thurlow said, that the rule, that executors are to be exempt from paying costs, holds even in cases where great delays and difficulties have been occasioned by the executor: for the Court will overlook these circumstances if it can. And although an executor or other trustee, who grossly misconducts himself in the execution of his trust, will be made to pay the costs occasioned by his misconduct, it does not, therefore, follow that he must in all cases pay the costs of the whole suit. If the suit is proper for other purposes, and the executor or trustee is a necessary party, he will not be compelled to pay all the costs: though, in the course of the suit, it should appear that he has misconducted himself. Thus, where a suit was necessary to determine what construction was to

1 *Borough of Hertford v. Poor of Hertford*, 2 Bro. P. C. ed. Toml. 377; *Attorney-General v. East Retford*, 2 M. & K. 36, 40.

2 *Willis v. Hiscox*, 4 M. & C. 197, 202; but see *Low v. Carter*, 1 Beav. 426, 430.

3 *Baker v. Carter*, 1 Y. & C. Ex. 250; *Royds v. Royds*, 14 Beav. 64; see also *White v. Jackson*, 15 Beav. 191; but see *Springett v. Dashwood*, 2 Glff. 521: 7 Jur. N. S. 93; *Kemp v. Burn*, 4 Glff. 348: 9 Jur. N. S. 375.

4 *Saunders v. Rickman*, 2 Ves. J. 26; see also *Fitzgerald v. Pringle*, 2 Moll. 584.

5 1 Cox. 134, 141; see also *Bennett v. Atkins*, 1 Y. & C. Ex. 247.

be given to a will, whether the residue was to be divided between nine or between six claimants, and, in the course of the suit, it appeared that the executors had improperly permitted rents to be in arrear, and retained balances in their hands, as to which inquiries were directed, and they were charged with interest. Sir Thomas Plumer, V.C., gave the executors the costs of the suit out of the fund, except only the costs of the inquiries as to the arrears of rent and balances: which, being solely occasioned by their breach of trust, he directed to fall upon them.¹ So, where trustees for sale purchased the trust estate at an undervalue, though without fraud and by auction, relief as to a resale was given against them with costs, but as to other parts of the case, namely, as to accounts which must have been taken, they were allowed their costs: as they would have been entitled to them in the ordinary way.²

In such cases, the Court frequently, instead of giving any direction with regard to costs, will content itself with making no order upon the subject, thereby leaving it to each party to pay his own costs.³ Thus, where a trustee, instead of accumulating a fund, as directed by the will, had improperly kept the balance in his hands, yet, as the costs of the suit had in a great measure been occasioned by inquiring what rule the Court ought to adopt with respect to the computation of interest, it was thought hard, under the circumstances, to fix the executor with costs, even relatively to the breach of trust, and, therefore, the Court gave no costs.⁴

If a suit has been occasioned by the mistake or some slight neglect of the trustee, the Court will sometimes content itself with not giving him costs;⁵ and, in some cases, where the conduct of trustees has not been wilful or perverse, the Court has permitted them to have them, although there has been loss to the estate. Thus, where trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the

1 *Tebbs v. Carpenter*, 1 Madd. 290, 308; and see *Heighington v. Grant*, 1 Phil. 600, 604; *Attorney-General v. Gibbs*, 1 De G. & M. 156, 161; *Pride v. Fooks*, 2 Beav. 430, 437; *Hewett v. Foster*, 7 Beav. 348; see however, *Knott v. Cottet*, 16 Beav. 77; 16 Jur. 752.

2 *Sanderson v. Walker*, 13 Ves. 601, 604; see also *Pocock v. Reddington*, 5 Ves. 794, 800.

3 *Newton v. Bennett*, 1 Bro. C. C. 359, 363; *Norton v. Steinkopf*, 18 Jur. 720, V. C. W.; *Harper v. Munday*, 7 De G. M. & G. 369, 375; 2 Jur. N. S. 1197; *Aylmer v. Winterbottom*, 4 Jur. N. S. 19, V. C. W.

4 *Raphael v. Boehm*, 13 Ves. 590, 592.

5 *O'Callaghan v. Cooper*, 5 Ves. 117, 123; *Heighington v. Grant*, and *Harper v. Munday*, *ubi sup.*; *Beer v. Tupp*, 10 W. R. 277, L. J. J.

desire of one of the parties interested, £6,600 for the estate and afterwards sold it for £3,600, the Court, although it charged them with the loss, gave them their costs, as their conduct had not been wilful nor perverse.¹

In general, where several defendants are involved in a breach of trust, the Court, in decreeing relief in respect of it, orders them to pay the costs of the suit jointly, without regard to their relative degrees of culpability, in order to give the plaintiff security for the payment;² but where trustees had made payments to the wrong persons, in consequence of forged certificates, the costs were primarily thrown upon the persons who had profited by the forgery, and ultimately upon the trustees.³

When it is said that personal representatives, and others bearing the character of trustees, are entitled to their costs out of the fund or estate which is the subject of the suit, the rule must be understood as applying strictly between themselves and their *cestui qui trusts*. In suits between them and those who are strangers to the trust, the ordinary rules as to the costs prevail, though, if a trustee or personal representative institutes or defends a suit in respect of his trust estate, he may reimburse himself, out of that estate, any sums he may have expended properly in such suit. Thus, where a trustee for sale filed a bill for a specific performance, which was dismissed, it was dismissed with costs; the defendant being considered as having nothing to do with the character in which the plaintiff sued.⁴

Costs also are given against assignees personally, and not *qua* assignees, they are to pay them, and then may be allowed to draw them out of the estate; but the opposite party is not to be exposed to the hazard, whether the estate is capable of bearing the costs or not; if it is not, it is the misfortune of the assignees.⁵ So also, an executor plaintiff cannot be distinguished, with respect to costs, from the party whom he represents;⁶ and if he revives a suit in which his testator was a party, he will incur his testator's liability

¹ *Taylor v. Tabrum*, 6 Sim. 281; and see *Flanagan v. Nolan*, 1 Moll. 84; *Travers v. Townsend*, *ib* 496.

² *Laurence v. Boule*, 2 Phill. 140; *Byrne v. Norcott*, 18 Beav. 336. 346.

³ *Eaves v. Hickson*, 30 Beav. 138; 7 Jur. N. S. 1297; and for the order, see *Seton*, 634, No. 2.

⁴ *Edwards v. Harvey*, G. Coop. 40.

⁵ *Poole v. Franks*, 1 Moll. 78.

⁶ *Westley v. Williamson*, 2 Moll. 458.

to costs. Thus, where an executor, after a bill by his testator had been dismissed with costs, revived the suit, alleging that he intended to appeal, he was ordered to pay the costs of the whole suit.¹

Where a bill was filed for the purpose of raising legacies charged on real estate, there being no personal estate, it was held that the executor, taking out probate in such a case, could get no costs;² and the rule is the same in the case of the executor of an insolvent mortgagor.³ The case is, however, said to be different with respect to an administrator *ad litem*, who will be entitled to his costs out of the fund;⁴ or, if that is deficient, from the plaintiff.

If an executor who has neither proved nor acted, although he has not renounced, is made a party to a suit, for the purpose of raising charges by the sale of real estate, the personal estate being insufficient, the costs of such executor cannot be paid out of the fund, but must be borne by the plaintiff: as he was not a necessary party.⁵

In suits by a creditor against a personal representative for payment of his own debt only, and not for general administration, if the creditor succeeds in establishing his demand, the Court directs his costs, as well as the amount of his debt, to be paid to him out of the estate;⁶ but the Court makes no order with regard to the payment of the costs of the personal representative: upon the principle that he may reimburse himself those costs out of the personal estate.⁷ Where, however, the suit is instituted, either by creditors or by legatees, for a general administration of assets, so that the whole estate of the deceased must necessarily come under the direc-

1 *Horlock v. Priestly*, 3 Sim. 621; *Lyon v. McKenna*, 2 Moll. 460.

2 *Nash v. Dillon*, 1 Moll. 236; but see *Makings v. Makings*, 1 De G. F. & J. 355, 379, L. C.

3 *Nicholson v. Falkner*, 1 Moll. 555.

4 *Ibid.*

5 *Ibid.*

6 *Davy v. Seys*, Mos. 204.

7 *Bumphrys v. Moore*, 2 Atk. 108. Courts of Law in giving judgment in favour of a creditor, direct the costs to be paid by the executor, *de bonis testatoris*; and if there be none, *de bonis propriis*; *Jeferies v. Harrison*, 1 Atk. 468. In Equity, however the rule is different; for if the assets are not sufficient to pay both debt and costs, the executor will not be decreed to pay costs: *Uvedale v. Uvedale*, 3 Atk. 118; *Twistleton v. Theobald*, Har. 165; unless he has misconducted himself, by having satisfied simple contracts, in preference to debts upon specialty: *Jeferies v. Harrison*, *ubi sup.* It may be suggested here, that, as an admission of assets by a representative is considered to be an admission of assets sufficient to pay costs, as well as the principal demand: *Philanthropic Society v. Hobson*, 2 M. & K. 357; such admission should not be made, unless the party is satisfied that the assets will cover debt and costs; and see *Rock v. Callen*, 6 Hare, 531, 534.

tion of the Court, the practice is different, and the costs of the personal representatives are always provided for; and even where there is a deficiency of assets to pay the whole of the testator's debts, the costs constitute the first charge upon the fund arising from the personal estate.¹ And this principle will be acted upon, where the testator is a defaulting trustee, and his estate is not sufficient to satisfy the breach of trust;² but the assignees in bankruptcy, *pendente lite*, of a defaulting administrator, will not be allowed their costs.³

The right of the personal representative to his costs, in such cases, may be defeated by his collusion, or by some of those circumstances which have been already pointed out as disentitling a trustee from his right to the costs, out of the fund; but where there are no circumstances of that nature, the costs of the personal representative constitute the primary charge; and he is entitled to immediate payment of them: even though he may be indebted to the testator in a sum payable on a future day.⁴

Where a suit for the administration of an estate has been properly instituted, the costs of the plaintiff and all necessary parties are considered as expenses in administering the estate; and are the first charge upon it,⁵ and if the estate is insufficient for the payment of all the costs, the executor's costs are the first charge; then the plaintiff's; and then those of the other parties.⁶ Where the plaintiff's claim fails, or the estate is exhausted by prior demands, so that he does not obtain payment of his demand, he is nevertheless entitled to his costs, if the Court has been enabled to administer the estate through his exertions.⁷ Where the costs

1 *Bennett v. Going*, 1 Moll. 529; *Young v. Everett*, 1 R. & M. 426; *Gaunt v. Taylor*, 2 Hare, 413, 420; *Offley v. Gibby*, 8 Beav. 602, 605; *Tanner v. Dancy*, 9 Beav. 339, 342; see, however, *Davy v. Seys*, Mos. 304; *Adair v. Shaw*, 1 Sch. & Lef. 290.

2 *Haldenby v. Spoforth*, 9 Beav. 196.

3 *Carr v. Henderson*, 11 Beav. 415; *Morrison v. Morrison*, 7 De G. M. & G. 214, 224, 226.

4 *Stevens v. Pilen*, 12 Jur. 282, V. C. W.; but see *Leedham v. Chauner*, 4 K. & J. 458, where a trustee's expenses, of an attempted premature sale, were held not a primary charge.

5 *Loomes v. Stothard*, 1 S. & S. 453, 461; *Lorkins v. Paxton*, 2 M. & K. 320; *Baker v. Wardle*, 25. 518; *Bennett v. Going*, 1 Moll. 539; *Leckmere v. Brazier*, 1 Russ. 72, 80; *Tanner v. Dancy*, 9 Beav. 339, 342. Where an executor is only entitled to priority for a portion of his costs, see *Blenkinsop v. Foster*, 3 Y. & C. Ex. 207; *Seton*, 145.

6 *Tipping v. Power*, 1 Hare, 405, 411; *Tanner v. Dancy*, *ubi sup.*; *Sanderson v. Stoddart*, 9 Jur. N. S. 1216, M. R. As to cases where plaintiff is entitled to costs as between solicitor and client; see *Wetenhall v. Dennis*, 33 Beav. 235; S. O. *nom. Wetenhall v. Davis*, 9 Jur. N. S. 1216, where a plaintiff legatee's priority over the other parties, was confined to his costs of getting in and realising the estate.

7 *Wedgwood v. Adams*, 8 Beav. 103, 105; *Seton*, 145.

of all parties were ordered to be taxed and paid, as between solicitor and client, on the assumption that the fund was sufficient to pay them all, and it subsequently appeared that the fund was insufficient, the Court rectified the order, by giving the executors their costs in priority.¹

Where a creditor institutes a suit, knowing that the estate has been wholly exhausted, or that there are no assets available for the payment of his claim,² or is informed thereof, before or after the institution of the suit, by the executor, or by creditors having prior claims, and such information turns out to be correct, he will be ordered to pay the whole of the costs, or the costs from the time he received such information ;³ or be disallowed all his costs, or his costs incurred after the notice.⁴

Where, however, in a case in which there were no residuary or pecuniary bequests, the next of kin of the testator instituted a suit for the administration of the estate, and the debts exhausted the residue, it was held that the plaintiff must bear his own costs ; but that the executor must have his out of the specific legacies.⁵

Where, in a creditors' suit, the creditors, who had signed an undertaking to contribute their proportion of the costs, had been paid in full, they were, on the assets subsequently proving deficient to pay the costs, ordered, on the petition of the plaintiff, to contribute to the plaintiff's costs ; and, for that purpose, to repay proportional parts of what they had received.⁶

In suits by *puisne* incumbrancers or general creditors, for the administration of assets, it is not usual to make persons having prior specific charges parties to the suit, as they will be untouched by a decree for sale ; and may therefore, if they are made parties, insist upon having the bill, as against them, dismissed with costs. They may, however, adopt the suit, and consent to a sale, and to receive payment of their principal and interest out of the proceeds : in which case, although the decree is for the payment of all parties,

¹ *Gaunt v. Taylor*, 2 Hare. 413, 420 ; see *contra*, *Swale v. Milner*, 6 Sim. 572.

² *Egan v. Baldwin*, 1 Moll. 536.

³ *Blewett v. Jessop*, Jac. 240, 242 ; *King v. Bryant*, 4 Beav. 460, 462 ; *Fuller v. Green*, 24 Beav. 217.

⁴ *Robinson v. Elliott*, 1 Russ. 596. *Loones v. Stotherd*, 1 S. & S. 458, 461 ; *Attorney-General v. Gibbs*, 1 De G. & S. 156, 161 ; *Sullivan v. Bevan*, 20 Beav. 399.

⁵ *Neubegin v. Bell*, 23 Beav. 386.

⁶ *Thompson v. Cooper*, 2 Col. 87.

according to their priorities, as they have adopted the suit the costs of all parties must, in the first instance, come out of the fund.¹

The right of the creditor, who files a bill for an administration of assets, to be paid his costs out of the fund in Court, does not affect the personal representative's right of retainer for satisfaction of a debt due to himself; and even where part of the personal estate had been paid into Court by an administrator, and another part of it remained in his hands, but there was a debt due to him from the intestate, greater than the amount of both funds, and no other assets to satisfy the general body of creditors, or even to pay the costs of the plaintiff, Sir John Leach, M. R., was of opinion, that the administrator's right of retainer was not affected by the circumstance of his having paid the money into Court, and that the plaintiff was not entitled to have his costs satisfied out of a fund to which the right of retainer extended.² But although a personal representative may retain for the amount of his own debt, in preference to the claim of the plaintiff for the costs of the suit, the same thing cannot be done by a devisee of real estates, which are subject to the payment of debts. If, however, a devisee gives notice that his right of retainer will exceed the assets, after such notice the plaintiff may be considered as proceeding at the peril of costs.³

Where a bill was filed to raise legacies charged on real estate, and the estate was insufficient to provide for payment of the legacies and the costs of suit in full, the devisees of the estate were held entitled to their costs out of the fund, in priority to those of the legatees.⁴

The above rules apply to cases where there is a deficiency in the fund realized by the suit to answer all the claims upon it; but, where this is not the case, the general rule is, that, wherever

1 *Brace v. Duchess of Marlborough*, Mos. 50; *White v. Bishop of Peterborough*, Jac. 402; *Egan v. Baldwin*, 1 Moll. 539; *Kenebel v. Scrafton*, 13 Ves. 370; *Armstrong v. Storer*, 14 Beav. 555, 558; see also *Ford v. Earl of Chesterfield*, 21 Beav. 426; *Wright v. Kirby*, 23 Beav. 463; *Dighton v. Withers*, 31 Beav. 423; *Ward v. Mackinlay*, 10 Jur. N. S. 1063; 13 W. R. 66, L. J. J.

2 *Chisum v. Deves*, 5 Russ. 29; *Langton v. Higgs*, 5 Sim. 228; *Hall v. Macdonald*, 14 Sim. 1; and as to right of retainer, see *Fox v. Garrett*, 28 Beav. 16; *Boyd v. Brooks*, 13 W. R. 419, L. C.

3 *Loomes v. Stotherd*, 1 S. & S. 458; *Hall v. Macdonald*, *ubi sup.*

4 *Woollett v. Woollett*, 4 Jur. N. S. 1292, V. C. S.

it is necessary to come to the Court, to establish a demand upon the property of persons deceased, the costs of such proceedings must be borne out of the assets.¹ Therefore, if a bill be filed by a creditor for his debt, or by a legatee for his legacy, the costs of the suit must be paid out of the testator's estate: so, also, must the costs of a suit, to obtain the benefit of a *donatio mortis causa*. The expenses of a suit, also, by residuary legatees, or next of kin, for an account and distribution of an estate, must be defrayed out of the general estate. In such suits, the circumstance that the defendant has offered to the plaintiff a full inspection of his account, makes no difference: a plaintiff, in such a case, is not bound to receive and acquiesce in the mere unsupported statement of the accounting party; he has a right to have the account of the estate taken with the sanction of oaths, and all other guards against deception which a Court of Equity can supply.² The circumstance, that the plaintiff himself, besides being a residuary legatee, is a co-executor with the defendants, will not make any difference in the application of the rule: though, if he files his bill in the character of creditor as well as legatee, and fails in establishing his claim as creditor, he will have to bear any additional costs which may have been occasioned by his unfounded claims.³ Where, however, the executor had truly stated the condition of the estate, a residuary legatee, who filed a bill to take the accounts, was ordered to pay the costs of the suit out of his own share.⁴

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs must be paid out of the general assets of the testator who, by his will, occasioned the difficulty;⁵ and it is invariably held, that if, in the course of a suit for the administration of an estate, a difficulty arises upon the construction of the will, the costs occasioned by such difficulty must be defrayed out of the assets:⁶ even though the difficulty has

1 See *Hampson v. Brandwood*, 1 Madd. 381, 394; *Gardiner v. Parker*, 3 Madd. 184. For the principles on which such costs will be taxed, see *post*.

2 *Sharples v. Sharples*, McLel. 506: 13 Pri. 745.

3 *Ibid*.

4 *MacKenzie v. Taylor*, 7 Beav. 467; *Thompson v. Clive*, 11 Beav. 475, 480; and see *Attorney-General v. Gibbs*, 1 De G. & S. 158, 161.

5 *Studholme v. Hodgson*, 3 P. Wins. 303.

6 This rule applies only to cases arising under wills; it does not apply where difficulties arise upon the construction of deeds: in which cases, although, if the deed which gives rise to the suit be so darkly framed as to occasion fair doubts as to its construction, the Court will excuse the unsuccessful parties their costs, it will not compel the successful party to pay them out of the estate: *Hampson v. Brandwood*, 1 Madd. 381, 394; see also *Earl of Oxford v. Churchill*, 3 V. & B. 59, 71, where the costs of an unsuccessful claim, set up on behalf of an infant, to a share of a fund under a settlement, were charged, not upon the general fund, but upon that portion of the fund to which the infant was held to be entitled.

arisen from parol evidence, introduced on the part of the defendant.¹

When it is said, that a legatee, filing a bill for his legacy, will be entitled to his costs out of the estate, it must be understood only as applying to those cases in which he is successful in the suit. If a person claims as legatee, and his bill is dismissed, he will not, in general, be allowed his costs out of the testator's estate, notwithstanding there is an ambiguity in the will, which renders it necessary to apply to the Court for its construction.² In such cases, the Court will usually, if the case involves considerable difficulties, occasioned by conflicting decisions or the acts of the testator, or the plaintiff has a fair ground for making his claim, make each party bear his own costs, by ordering the dismissal to be without costs. Therefore, where a bill was filed, by the next of kin of a testator against the executors, for the undisposed of residue, and the next of kin failed, the bill was dismissed without costs: because the Court thought there was some excuse for their litigating the executor's right to it.³ And where, after a verdict upon an issue, finding against the legitimacy of a person claiming a legacy as a legitimate child, a question arose as to the costs, the Court refused to give costs against him: as he had always borne the name of the family, and been received in it.⁴ Where, however, the bill is not simply dismissed, but a declaration of right is made, the plaintiff, though unsuccessful, is often given his costs.⁵

It may be noticed here, that in a case where a bill was filed for a legacy, which had been bequeathed to an infant, and which had been more than satisfied by advances made for the infant's benefit, during his minority, and by a larger legacy bequeathed to the infant by the executor, the Court decreed in favour of the legatee, though there had been no demand for ten years after he came of age; but as it considered the demand very ungracious, it gave the

¹ *Nourse v. Finch*, 1 Ves. J. 344, 362.

² *Lister v. Sherringham*, cited 1 Newl. Pr. 592; see, however, *Lynn v. Beaver*, T. & R. 68, 69; *Windham v. Graham*, 1 Russ. 331, 347; *Lee v. Delane*, 4 De G. & S. 1, 6: 14 Jur. 361.

³ *Brashbridge v. Woodroffe*, 2 Atk. 69.

⁴ *Forbes v. Taylor*, 1 Ves. J. 99.

⁵ *Merlin v. Blagrove*, 25 Beav. 125, 135, 136; *Lynn v. Beaver*, T. & R. 69, 69; *Thomson v. Moses*, 5 Beav. 77, 81; *Wedgwood v. Adams*, 8 Beav. 103; *Johnston v. Todd*, ib. 489; *Cooper v. Pitcher*, 4 Hare, 485; *Boreham v. Bignall*, 8 Hare, 131; *Turner v. Frampton*, 2 Coll. 331; *Lee v. Delane*, 4 De G. & S. 1: 14 Jur. 361; *Hodgson v. Clarke*, 1 De G. F. & J. 394.

legatee no costs.¹ So, also, where the legatee persisted in useless litigation, no costs were allowed.²

It is necessary, here, to advert to an important distinction with regard to the portion of the testator's estate out of which the costs are to be paid : for the rule is, that where any doubt or ambiguity arises under a will, with reference to any bequest or devise, which renders an application to the Court necessary, the costs occasioned by such application are to be paid, not out of the property with respect to which the doubt arises, but out of the general assets not otherwise disposed of.³ In other words, they are payable out of what is usually termed the residuary personal estate : although, perhaps, the term may not be quite correct, inasmuch as the residuary estate is, strictly speaking, that part of the estate which remains after payment of all legal and testamentary claims upon the estate, whether for debts, legacies, or costs ;⁴ and this rule applies, although the testator charges his debts, funeral, and testamentary expenses, upon a specific fund.⁵ Where, however, a testator charged a specific part of his estate with his debts, and the costs of executing the trusts of his will,⁶ or with his debts, funeral, and testamentary expenses, in exoneration of the residue,⁷ or in substitution for the residue, which failed,⁸ the costs of the suit were held to be payable out of the part so charged.

When next of kin, or persons claiming as a class under the will of a testator, succeed in establishing their title under a decree for the administration of the estate, it is usual for them to be allowed their costs : not their costs incurred out of doors in collecting information as to the pedigree of the party : not the costs of private inquiry ; but the costs incurred in the Judge's Chambers, and generally of proceedings in the suit ;⁹ and the rule prevails,

¹ *Lee v. Brown*, 4 Ves. 362, 369.

² *Ottley v. Gibby*, 8 Beav. 602, 605 ; *Thompson v. Clive*, 11 Beav. 475, 480.

³ *Studdolme v. Hodgson*, 3 P. Wms. 303 ; *Jolliffe v. East*, 3 Bro. C. C. 25, 27 ; *Baugh v. Reed*, 3. 193 : 1 Ves. J. 257, 265 ; *Attorney-General v. Hurst*, 2 Cox, 364, 366 ; *M. C. nom. Attorney-General v. Winchelsea*, 3 Bro. C. C. 375, 381 ; *Barrington v. Triatram*, 6 Ves. 345, 349 ; *House v. Chapman*, 4 Ves. 542 ; *Pearson v. Pearson*, 1 Sch. & Lef. 12 ; *Bagshaw v. Newton*, 9 Mod. 283 ; *Nisbett v. Murray*, 5 Ves. 149, 158 ; *Wilson v. Brownsmith*, 9 Ves. 180, 182 ; *Wilson v. Squire*, 13 Sim. 212 ; *Handley v. Davies*, 5 Jur. N. S. 190, V. C. S.

⁴ *Byre v. Marden*, 4 M. & C. 231, 243 ; *Ripley v. Moysey*, 1 Keen, 578 ; *Pickford v. Brown*, 2 K. & J. 426 ; 2 Jur. N. S. 781, 783 ; *Sanders v. Miller*, 25 Beav. 154 ; *Stringer v. Harper* (No. 2), 26 Beav. 585 ; 5 Jur. N. S. 401 ; *Maddison v. Chapman*, 1 J. & H. 470 ; *Jolliffe v. Twyford*, 4 Jur. N. S. 1166, M. B.

⁵ *Browne v. Groombridge*, 4 Madd. 496, 502 ; *Langley v. Taylor*, 1 Giff. 67 ; *Stringer v. Harper*, *ubi sup.*

⁶ *Altop v. Bell*, 24 Beav. 451 ; see however, *Lord Brougham v. Lord Poulett*, 19 Beav. 119 : 1 Jur. N. S. 151.

⁷ *Morrell v. Fisher*, 4 De G. & S. 422, 424.

⁸ *Wilson v. Heaton*, 11 Beav. 402, 404.

⁹ *Shuttleworth v. Howarth*, C & P. 228, 232.

whether they are made parties to the suit, or the fund is administered, without formally bringing them before the Court upon the record.¹ In such cases, if the residuary estate has ultimately to be divided amongst different classes of persons, the practice is for the costs of all the claimants to be paid out of the general estate, before any apportionment is made: even though the effect of such a mode of payment is to diminish the fund of one class of claimants, to an extent materially greater than the amount of costs due to that particular class.

Moreover, where the particular fund which has occasioned the litigation is no part of the residue, the general rule is, that the residuary estate should bear the costs of administering the estate. Thus, where it was necessary to have the decision of the Court, as to whether a legacy of 10,000*l.*, given two sisters, was a joint bequest or in common, the costs were ordered to be paid, not out of the legacy, but out of the general assets.² So, where a bill was brought to secure and have the benefit of a contingent interest devised over, the costs were ordered to be paid out of the residuary estate; and where the question was, whether a legacy was specific or not, the costs of determining that question were ordered out of the general estate, in preference to the specific legacy, although the general estate was made the subject of a residuary bequest.³ Upon the same ground, it was formerly held, that by giving a legacy to an infant, the testator made it necessary to come into Court for directions how to lay it out; and that, therefore, the costs of a bill by an infant legatee, to have the legacy secured for his benefit, must be paid out of the residue.⁴ Such applications have, however, been rendered unnecessary, by the 36 Geo. III. c. 52, s. 32, which, in the case of an infant, authorises the executor to pay the legacy into Court; and in *Whopham v. Wingfield*,⁵ the Court said that, in future, the costs would not be given in such a case. In the application of the rule, that the costs of suit are payable out of the general residue, no distinction exists between the cases in which it is disposed of, and those in which it is not;⁶ and where there are specific bequests and pecuniary legacies, which

1 *Hutchinson v. Freeman*, 4 M. & C. 490: 3 Jur. 604; *Swift v. Swift*, 1 De G. F. & J. 160.

2 *Shuttleworth v. Howarth*, *ubi sup.*

3 *Jolly v. East*, 3 Bro. C. C. 25, 27.

4 *Nisbett v. Murray*, 5 Ves. 149, 158.

5 *Anon. Mos. b.*

6 4 Ves. 630.

7 *Byre v. Marston*, 4 M. & C. 244; *Nisbett v. Murray*, *ubi sup.*; *Hosce v. Chapman*, 4 Ves. 542, 550; *Cookson v. Bingham*, 17 Beav. 202, 203.

exhaust the whole estate, so that there is no residue, the costs occasioned by the specific bequests will be thrown upon the general fund, out of which the pecuniary legacies are payable. Thus, in *Barton v. Cook*,¹ where there were specific and pecuniary legacies, and the personal estate, after setting apart the specific legacies, was not sufficient to pay all the pecuniary legacies, so that an abatement amongst them became necessary, the costs were ordered to be paid out of the personal estate not specifically bequeathed. The rule will also prevail, where property intended to be disposed of has, in the result, been declared undisposed of: there the costs will not be thrown upon the property so declared to be undisposed of, but, as in other cases, upon the general estate. Thus, in *Howse v. Chapman*,² where some of the bequests in favour of the City of Bath, which were specific, were held to be void under the Statute of Mortmain, the costs were ordered, in the first instance, to be paid out of the residue undisposed of, that is, out of the property not specifically given; but, in case of a deficiency, the remainder of the costs were to be defrayed out of the property specifically bequeathed, and to the payment thereof the property well given, and the property intended to be given, but which had been held to be undisposed of, were to contribute *pro rata*.

So, where a legacy given by a will has lapsed by the death of the legatee in the lifetime of the testator, the costs will be paid out of the general fund, and not out of the lapsed legacy:³ and the same rule applies, where the intestacy, as to part, does not arise from lapse, but from revocation of a bequest: as in *Cresswell v. Cheslyn*,⁴ as explained in the note to *Skrymsher v. Northcote*;⁵ and in the latter case itself, in which the question was argued, that the costs of the suit ought to be paid out of the part undisposed of, and not out of the general estate, Sir Thomas Plumer, M. R., decided that the costs should be apportioned.⁶

It makes no difference whether the property undisposed of, (whether from lapse or from any other cause,) was given as a specific or pecuniary bequest, or as a share of the residue: in either case, the costs of the suit will not fall on the undisposed of share,

1 5 Ves. 461, 464.

2 4 Ves. 542, 551.

3 *Roberts v. Walker*, 1 R. & M. 752, 767

4 2 Eden, 123.

5 1 Swanst. 571 n. (n).

6 See *Eyre v. Marsden*, 4 M. & C. 231, 245.

but on all the shares. Thus, in *Ackroyd v. Smithson*,¹ the costs were paid *pro rata* out of the share of the residue which the legatees took, and those shares which had lapsed; and, in cases where part of the property given to a charity becomes undisposed of, from being within the Mortmain Act, it has been long settled that the costs are paid *pro rata* out of the property so undisposed of, and the property well bequeathed to the charity.²

The cases above referred to, establish the principle that, where an intestacy as to part of the personal estate arises from the intention of the testator being defeated by the happening of some event, or by the operation of the law, the part thus falling to the next of kin, is, in his hands, subject to the same liability as to costs, and no more, that it would have been subject to, if the gift had taken effect; and the principle has been extended to cases where accumulations directed by a will have been declared absolutely null and void, under the Thellusson Act (39 & 40 Geo. III. c. 98). Thus, in *Eyre v. Marsden*,³ where Lord Langdale, M.R.,⁴ having declared that a direction for the accumulation of the produce of the testator's freehold and personal estate was void under the above Act, and that such parts of the accumulation as arose from the real estate belonged to the heir, directed the costs of the suit to be paid *pro rata* by the heir, and personal representatives, out of the accumulations devolving upon them: Lord Cottenham, upon appeal, varied the decree, by directing the costs to be paid out of the general estate of the testator.⁵

But although the rule is, that the costs of a litigation, in the course of administering a will, are given out of the general assets, in preference to the particular fund, yet, if the particular fund has been served from the residue, and the question is merely between the persons claiming to be entitled to it, the costs must come out

1 1 Bro. C. C. 503. The printed report, however, is silent as to costs, but the direction as to costs, is shown by the Registrar's book; see 4 M. & C. 245; see also *Maddison v. Pye*, 33 Beav. 656.

2 Per Lord Cottenham, in *Eyre v. Marsden*, 4 M. & C. 231, 245; and see *Attorney-General v. Lord Winchelsea*, 3 Bro. C. C. 373, 380; *Attorney-General v. Hurst*, 2 Cox, 364, 366; *Hovess v. Chapman*, 4 Ves. 642, 650; *Taylor v. Bogy*, 5 Jur. N. S. 137, V. C. S.

3 4 M. & C. 231; and see *Elborne v. Goods*, 14 Sim. 165, 179; 3 Jur. 1001; *Barrett v. Buck*, 12 Jur. 771, V. G. W.; *Holgate v. Haworth*, 17 Beav. 259; *Oddis v. Brown*, 4 De G. & J. 179, 196; 5 Jur. N. S. 636, 637; *Green v. Gascoyne*, 11 Jur. N. S. 145; 13 W. R. 371, L. C.

4 2 Keen, 564, 578, 580.

5 4 M. & C. 243.

of the particular fund.¹ Thus, it is the ordinary course of the Court, where there is some legacy clearly payable, but it is uncertain who is entitled to it, to order the legacy to be paid into Court to a separate account, with liberty for any person interested in it to apply, and to proceed to a distribution of the residue of the testator's estate : in such case, any costs which may afterwards be incurred, in inquiring who is entitled to such legacy, must come out of the particular fund : for the Court will never postpone the distribution of the residue, to answer the costs of such inquiry.

When, in consequence of the state in which a testator left his papers, a reasonable doubt was created as to his having left a will, the costs of the parties necessary to discuss the question of " will or no will " were ordered to be borne by his estate.²

Where the question was, whether certain legacies were specific or not, and inquiries had been directed as to the appointment of a guardian and maintenance for a specific legatee, who was an infant, the costs of the suit, except as to the inquiries with respect to the guardian and maintenance, were ordered to be paid out of the general assets, and the costs as to the guardian and maintenance were directed to be paid by sale of a sufficient part of the specific legacy.³ So, also, the costs of the Bank of England, made a party for the security of a legacy, the right to which was under discussion, were paid out of the legacy;⁴ and if the plaintiffs, in a suit relating to the construction of a will, unnecessarily mix up other questions with the questions arising under the will of the testator, the costs of such part of the suit only as relate to the construction of the will, will be paid out of the general assets. Thus, where a doubt arose under a will, whether a legacy given by the testator was undisposed of, and a suit was instituted by the residuary legatees of one of the next of kin of the testator, instead of his personal representative, in the course of which questions arose between them, the costs of so much only of the suit as related to the

¹ *Jenour v. Jenour*, 10 Ves. 562, 578; see also *Shaw v. Pickthall*, Dan. 92; *Duke of Manchester v. Bonham*, 3 Ves. 61, 64; *King v. Taylor*, 5 Ves. 806, 810; *Wilson v. Squire*, 13 Sim. 212; *Dugdale v. Dugdale*, 12 Beav. 247, 251; *Governesses' Institution v. Rusbridger*, 18 Beav. 467; *Richardson v. Rusbridger*, 20 Beav. 136; *Attorney-General v. Lewes*, 8 Hare, 32, 43; see also *Pennington v. Buckley*, 6 Hare, 451, 455. Costs of taking out administration to a share were allowed, under circumstances, out of the general estate: *Cotton v. Fenrose*, 18 Jur. 761, V.C.K.B.

² *Beesey v. Bostwick*, 14 Grant, 246.

³ *Barton v. Cooke*, 5 Ves. 461, 464.

⁴ *Hammond v. Neame*, 1 Swanst. 88.

decision upon the will were ordered to be paid out of the general assets of the original testator.¹

It may be remarked that, where a party entitled, either to a legacy or share of a residue, incurs his legacy or share, or by any act of his own occasions additional expense in respect of it, beyond what is necessary for the due administration of the estate, the additional expense will be thrown upon the particular fund or portion; and only one set of costs will be allowed out of the estate to the party entitled and his incumbrancers, and such costs will in general be made payable to the first incumbrancer.²

A similar rule will be applied, in the case of a bankrupt legatee and his assignees;³ of a trustee and his *cestui que trust*;⁴ and of a husband and wife, living apart, and improperly severing in their defence.⁵

Where different funds are the subject of distribution or discussion in the same suit, the costs of the suit are generally apportioned *pro rata* between the different funds.⁶

In *Leacroft v. Maynard*,⁷ where the testator charged his legacies upon his real estate, and then bequeathed a legacy to a charity, the amount of which he altered by his codicil, whereupon a bill was filed for the general administration of the testator's estate, and another bill was also unnecessarily filed by the heir at law to have the legacy bequeathed to the charity declared void under the Statute of Mortmain, and to have the real estate conveyed to him discharged of it: the Court directed that the costs of the suits, so far as they related to the personal estate, should come out of the personal estate, and that the costs which related to the real estate should be borne by the real estate: so that the costs of the bill filed by the heir should fall upon the real estate. So, also, the

¹ *Skrymsher v. Northcote*, 1 Swans', 566 572.

² *Gresley v. Lavender*, 11 Beav. 417, 420: *Seton*, 162 (No. 13), 167, where form of order is given; *Remnant v. Hood* (No. 2), 27 Beav. 618; *Ward v. Yates*, 1 Dr. & Sm. 80; and see *Bassevi v. Serra*, 8 Mer. 674, 676: 14 Ves. 313, 317; see also *Mocatta v. Lousada*, cited 3 Mer. 676: 14 Ves. 317.

³ *Brace v. Ormond*, 2 J. & W. 426; *Garay v. Whittingham*, 5 Beav. 268, 270.

⁴ *Remnant v. Hood*, *ubi sup.*; *Farr v. Sherife*, 4 Hare, 528.

⁵ *Garay v. Whittingham*, *ubi sup.*

⁶ *Haighton v. Grant*, 1 Beav. 228, 231; *Johnston v. Todd*, 8 Beav. 480, 492; *Hopkinson v. Ellis*, 10 Beav. 160, 176; *Sanders v. Miller*, 25 Beav. 154; *Elborne v. Goode*, 14 Sim. 165, 179: 8 Jur. 1001; *Christian v. Foster*, 2 Phill. 161, 166; and see *Attorney-General v. Lawes*, 8 Hare, 32.

⁷ 1 Ves. J. 279: 8 Bro. C. C. 233.

costs have been apportioned between the appointed and unappointed parts of a fund,¹ according to the different values of the appointed parts;² and between several charities, where one scheme was settled for them all.³ So, also, where there were no debts or personal estate, the costs were thrown rateably on devised and descended realty.⁴ Similiar decrees, for an apportionment of costs between real and personal estates, appear to have been made in *Jones v. Mitchell*,⁵ and *Dixon v. Dawson*.⁶

Where the suit was for the administration of the estate of a testator, but it also involved the execution of the trusts of a settlement, the costs occasioned by that portion of the suit relating to the settlement were directed to be borne by the settlement fund;⁷ and in *King v. Taylor*,⁸ where the question was whether a legacy of stock and a share of the residue under a will went to the husband of a married woman who was dead, or to her brother, and the Court decided that the legacy went to the husband, and the share of the residue to the brother, the costs were ordered to be borne by each fund in moieties.

In suits to rectify settlements, in which no blame is imputable to either side, the costs will, in general, be made payable out of the settled property.⁹

It may be mentioned, in this place, that where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust estate, the Court will not content itself with merely giving him a lien upon the corpus of the estate by the decree, leaving him to enforce it by subsequent proceedings, but it will direct an immediate sale of a sufficient part of the estate to raise the costs: and it appears that the omission of such a provision in the decree may be the subject of a re-hearing.¹⁰ A life interest will not be valued, for the purpose of charging costs upon it.¹¹

1 *Trollope v. Routledge*, 1 De G. & S. 692, 671.

2 *Warren v. Postlethwaite*, 2 Coll. 116, 122.

3 *Re Stafford Charities*, 26 Beav. 667.

4 *Bagot v. Legge*, 2 Dr. & Sm. 259: 10 Jur. N. S. 1092.

5 1 S. & S. 290, 295.

6 2 S. & S. 327, 340: see also 1 Bro. C. C., ed. Belt, 265, n. (3): *Walter v. Maunde*, 19 Ves. 424, 429; *Bunnatt v. Foster*, 7 Beav. 540, 544: *Johnston v. Todd*, 8 Beav. 489, 492; *Hopkinson v. Ellis*, 10 Beav. 189, 176; *Sanders v. Miller*, 25 Beav. 164; and see *Saton*, 247.

7 *Irby v. Irby*, 24 Beav. 525.

8 5 Ves. 806, 810.

9 *Stock v. Fining*, 25 Beav. 235.

10 *Burkett v. Spray*, 1 R. & M. 118, 115; *Mandeno v. Mandeno*, Kay, App. 2, 4. It seems, however, that, in such a case, the party entitled to the costs, instead of appealing, may apply by motion to have them raised by sale: see *Cannell v. Beeby*, *Beames on Costs*, App. No. 7.

11 *Coombe v. Hughes*, 18 W. R. 700, L.Js.

In the case of costs, the Court will take any fund which, in the absence of all others, is liable to costs, and apply it for that purpose. If the fund is not ultimately to bear the costs, it is usual and more proper to add to the order the words, "without prejudice to the question how the same are ultimately to be borne," or words to a similar effect; but the absence of such words does not, necessarily, imply that the Court has decided that the fund out of which the costs are directed to be paid is the fund which must ultimately bear them; nor does their absence prevent any error from being set right, at any future period.¹

The Principles of Taxation.

It has been stated, that the Court of Chancery makes a distinction, with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs; and that this distinction is marked by the terms of: "costs as between party and party," and "costs as between solicitor and client": the Court, in the latter case, permitting a larger proportion of actual expenditure to parties holding particular characters, than it allows in the former case. No definite rules can be laid down, with respect to the difference between the costs allowed upon one principle of taxation, and those allowed upon the other. In general, however, in taxations as between party and party, only those charges will be allowed which are strictly necessary for the purposes of the prosecution of the litigation, or are contained in the tables of fees annexed to the general orders and regulations of the Court: while in taxations as between solicitor and client, the party will be allowed as many of the charges which he would have been compelled to pay his own solicitor, as being costs of suit, as fair justice to the other party will permit.²

It must not, however, be supposed that, in taxations between solicitor and client, the party, whose costs are to be taxed, will be allowed everything which his own solicitor might claim against him upon the taxation of his bill: for regard will be had to the position of the parties, and the fund out of which the costs are to be paid; and a distinction is made: First, where such costs are

¹ *Sheppard v. Sheppard*, 33 Beav. 129, 130, 131; *Seton*, 87, 98.

² See *Forster v. Davies*, 11 W. R. 813, M. R.; *Morgan & Davey*, 1.

payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund, in which the party entitled to costs has only a limited interest; and, thirdly, where such costs are payable out of a fund belonging exclusively to such party himself.¹ These distinctions, however, are not made in the order directing the taxation, but only when the order is acted upon by the Taxing Master; and, if it is intended that the party, whose costs are to be paid out of a general fund, should be fully indemnified against all expenses, or against any expenses not strictly costs of suit, care must be taken to have it so expressed in the ordinary order: as the direction, that the costs are to be taxed as between solicitor and client, will not, in such a case, be sufficient.²

The above observations will suffice to convey a general outline of the distinction between costs as between party and party, and as between solicitor and client. We will now proceed to inquire in what cases the Court will direct the costs of a suit to be taxed upon either principle; or rather, in what cases the Court will direct the costs of a party to be taxed as between solicitor and client: the general rule of the Court being, that all costs are to be taxed as between party and party, except where they are specially directed to be taxed as between solicitor and client: whence it follows, that, where the direction is simply to tax the costs of the suit, it is always construed to mean as between party and party.³

It may be here mentioned, that, where the Court has once adopted the principle of taxation as between solicitor and client, in favour of a particular individual, or of a particular class, it will, in its future proceedings, wherever it becomes necessary to direct a further taxation of costs, direct it to be made upon the footing of the former taxation. Thus, if, upon the original hearing, the costs of a party have been ordered to be taxed as between solicitor and client, the Court will, at the hearing upon further consideration, direct the subsequent costs of the same party to be taxed in the same manner: even though a different state of circumstances should appear from the certificate, from that which was supposed to exist at the original hearing; it is only, however, where the former direction for taxation has been made at a hearing of the

¹ *Seton*, 92, 98.

² See *Seton*, 92.

³ *Seton*, 92; *Morgan & Dewey*, 1.

cause, either original or upon further consideration, that the Court will consider itself bound by it, at the subsequent hearing.

It appears to be the general rule of the Court, that, when personal representatives and other trustees are entitled to costs out of the fund, such costs will be directed to be taxed as between solicitor and client. It is, however, in general, only in cases in which there is a fund under the control of the Court that such a direction will be given: where there is no such fund, or a bill against the trustee is dismissed, the costs awarded to the trustee will be only the ordinary costs.¹ Thus, where a testamentary paper was held void for uncertainty, and the bill was dismissed with costs, it was suggested that some of the defendants, being trustees, should receive their costs, as between solicitor and client; but the Court, on the ground that they were trustees of a nullity, and that there was no fund out of which such costs could come, refused to allow them their costs as between solicitor and client; and dismissed the bill, with costs as between party and party.² Under special circumstances, however, costs have been given, in such cases, as between solicitor and client.³

Where a trustee disclaims, he will only be allowed his costs as between party and party;⁴ and this rule will be observed, even where the plaintiff continues him as a party to the suit, up to the hearing, although he has disclaimed by his answer;⁵ and where a bill was dismissed against a person who was named in a deed as a trustee, but had not executed the deed, or in any manner accepted the trust, and had, by his answer, altogether declined it, he was held not to be entitled to have it dismissed with costs as between solicitor and client, but only with the ordinary costs between party and party.⁶

1 *Saunders v. Saunders*, 3 Jur. N. S. 727: 5 W. R. 479, V.C.K.; *Edenborough v. Archbishop of Canterbury*, 3 Russ. 98, 112; *Seaton*, 707.

2 *Mohun v. Mohun*, 1 Swanst. 201, 208.

3 *Edenborough v. Archbishop of Canterbury*, *ubi sup.*, where the Court, on the authority of *Townsend v. Bishop of Norwich*, which occurred in 1824, gave costs, as between solicitor and client, to the Archbishop and Bishop of London, who had been made parties to the suit for the purpose of restraining the induction of an incumbent to a living, or from availing themselves of any lapse which might occur pending the suit; see also *Poole v. Pass*, 1 Beav. 600, 606: *Attorney-General v. Cumming*, 2 Y. & C. C. 139, 156, 159.

4 *Bulkeley v. Earl of Eglinton*, 1 Jur. N. S. 994, V.C.W.; *Heap v. Jones*, 5 W. R. 106, V.C.K.

5 *Bray v. West*, 9 Sim. 429.

6 *Norway v. Norway*, 2 M. & K. 278: overruling *Sherratt v. Bentley*, 1 R. & M. 655.

It has been already stated, that, in a charity case, where an heir at law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client, although there was no resulting trust in his favour;¹ and it seems that, in general, in charity cases, the heir will, if he makes no improper point, be awarded his costs as between solicitor and client. This rule was acted upon in *Currie v. Pye*;² and in *Moggridge v. Thackwell*;³ in which latter case the heir at law, as well as the Attorney-General and all the other parties, were allowed their costs out of the fund, as between solicitor and client. The next of kin will also, in general, be allowed, in charity cases, their costs as between solicitor and client.⁴

It seems also, that in general, where the object of a suit is to establish a charity, and the estate is ample, the costs of all parties will be taxed as between solicitor and client;⁵ and, in *Attorney-General v. Carte*,⁶ where the decree had merely ordered that the parties should be paid their costs, to be taxed by the Master, out of the estate, without giving any direction as to the principle of taxation, in consequence of which the Master refused to tax the costs otherwise than as between party and party, the Court entertained a petition for an order that the taxation of the costs should be as between solicitor and client. There is not, however, any fixed rule of the Court in this respect.⁷

Where a bill has been filed for the general benefit of creditors, and the estate has proved insufficient,⁸ the Court will give the plaintiff his costs of the suit, out of the fund realised by his exertions, as between solicitor and client.⁹ This rule equally applies, where the bill has been filed by a simple contract creditor, and the specialty creditors have proved debts to an amount exceed-

1 *Attorney-General v. Haberdashers' Company*, 4 Bro. C. C. 178; and see *ib. ed. Bell's*, n. (2); *Beames on Costs*, App. No. 18.

2 17 Ves. 462, 463.

3 1 Ves. J. 464, 475; 7 Ves. 36, 83; see, however, *Whicker v. Hume*, 14 Beav. 509, 532.

4 *Gaffney v. Hevey*, 1 Dr. & Wal. 12, 25; *Carler v. Green*, 3 K. & J. 501; 3 Jur. N. S. 906, 907.

5 *Moggridge v. Thackwell*, *ubi sup.*; *Currie v. Pye*, *ubi sup.*; and see *Attorney-General v. Carte*, *Beames on Costs*, App. No. 2; 1 Dick. 113; *Bishop of Hereford v. Adams*, 7 Ves. 524, 532; and see *Osborne v. Denne*, 7 Ves. 424.

6 *Ubi sup.*

7 *Aria v. Emanuel*, 9 W. R. 366, M. R.; *Whicker v. Hume*, 14 Beav. 509, 523.

8 See *Sutton v. Doggett*, 3 Beav. 9.

9 *Turner v. Turner*, cited 2 R. & M. 687; *Hood v. Wilson*, *ib.*; *Brodie v. Bolton*, 3 M. & K. 145; *Stanton v. Hatfield*, 1 Keen, 358, 362; *Tootal v. Spicer*, 4 Sim. 510; *Sutton v. Doggett*, 3 Beav. 9; *Thomas v. Jones*, 1 Dr. & Sm. 124; 6 Jur. N. S. 291; overruling *Young v. Beecroft*, 1 R. & M. 426; *Rowlands v. Tucker*, 1 R. & M. 635; and see *Seton*, 145, 146; *Morgan & Dacey*, 133.

ing the value of the assets received :¹ unless the specialty creditors have given the plaintiff notice of the insufficiency of the estate, and not to proceed with the suit.²

A similar rule has been adopted, in the case of suits by legatees, where the estate, although sufficient to pay the debts, has proved insufficient to pay the legacies in full.³ If, however, in a suit instituted by a legatee, the fund is insufficient for the payment of the debts and costs,⁴ or, if in a suit instituted by a residuary legatee, the fund is insufficient for the payment of the debts, legacies and costs,⁵ the plaintiff will only be allowed his costs, as between party and party.⁶

Where, in an administration suit by the heir at law, the realty and personalty were insufficient, the heir had his costs as between solicitor and client.⁷

But it is only where the fund is insufficient, that the plaintiff, in suits of this description, will be entitled to have his costs taxed in so favourable a manner : where the fund is sufficient to pay all the debts or legacies, and to leave a surplus for the residuary legatee, the plaintiff will only have his costs as between party and party.⁸ Where, however, in a creditors' suit, a fund had been realised by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale, M. R., considering it a hardship that creditors not parties to the suit should come in and reap the benefit of it, without contributing to the plaintiff's extra costs, made an order, by which it was directed that the plaintiff's costs, as between party and party, should be paid out of the fund, and that his extra costs should be paid, *pro rata*, by all the creditors who partook of the benefit of the suit.⁹

1 *Larkins v. Paxton*, 2 M. & K. 330; *Barker v. Wardle*, *ib.* 313; *Richardson v. Jenkins*, 17 Jur. 446; not reported on this point in 1 Drew. 477.

2 *Morgan & Davey*, 137.

3 *Burkett v. Ransom*, 2 Coll. 536; *Cross v. Kennington*, 11 Beav. 89; *Waldron v. Frances*, 10 Hare, App. 19; *Thomas v. Jones*, 1 Dr. & Sm. 124; *Bissett v. Burgess*, 23 Beav. 278, 281.

4 *Wiston v. Clowes*, 15 Sim. 610; *Wetenhall v. Dennis*, 33 Beav. 285; S. C. *nom. Wetenhall v. Davis*, 9 Jur. N. S. 1216. As to the costs of plaintiffs in a next-of-kin suit, where residue is exhausted in debts, see *Newbegin v. Bell*, 23 Beav. 326.

5 *Wroughton v. Colquhoun*, 1 De G. & S. 387.

6 See, however, *Wroughton v. Colquhoun*, *ubi sup.*, and *Newman v. Hatch*, cited Seton, 165, as to the allowance of special costs in addition.

7 *Turdrew v. Howell*, 2 Giff. 530; 7 Jur. N. S. 937; *Shittler v. Shittler*, 4 N. R. 475, M. R.

8 *Brodie v. Bolton*, 3 M. & K. 168; *Thomas v. Jones*, *ubi sup.*

9 *Stanton v. Hatfield*, 1 Keen, 358, 362; *Sutton v. Doggett*, 3 Beav. 9; *Goldsmith v. Russell*, 5 De G. M. & G. 547, 556.

It frequently happens that, in suits to which trustees or personal representatives are parties, either as plaintiffs or defendants, and which do not involve any account, they have incurred expenses which it is very right they should be reimbursed, but which do not fall under the denomination of costs of the suit, even when directed to be taxed as between solicitor and client. Of this nature are cases laid before counsel, for their opinion preparatory to the institution of the suit, and many other charges of that description, to which, where there is a decree directing an account a trustee would be considered entitled, under the head of just allowances, but which, where there is no decree for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing: especially in cases where the suit does not involve property out of which they can be retained, or disposes of the whole of the trust fund. The Court will, therefore, in such cases, upon the statement that such charges have been incurred, extend the order for the taxation of costs, as between solicitor and client, to the costs, charges, and expenses properly incurred by the trustee.¹ Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred, relating to the trust property, in or in connection with the suit: although they are not properly costs in the cause; and under it he may be allowed the costs of litigation conducted by him strictly as trustee, whether successfully or unsuccessfully, and although he may not have been allowed such costs in the suits in which they have been incurred.²

Where the costs are to be paid out of the party's own fund the direction to tax as between solicitor and client, may properly include his costs of or relating to the suit or proceeding, and consequent thereon.³

Except in the cases above pointed out, it is not the practice to give a party his costs, charges, and expenses. Where, however, a defendant put in four insufficient answers, and was committed till he was examined upon interrogatories, he was, after putting in his examination, ordered to be discharged, on payment of the plaintiff's

¹ *Seton*, 768; *Morgan & Davey*, 2. For form of order, see *Seton*, 767.

² *Graham v. Wickham*, 11 Jur. N. S. 168: 13 W. R. 386, L.J.J.; but see *Payne v. Little*, 27 Beav. 83.

³ *Seton*, 93.

costs, charges, and expenses.¹ And where an answer was ordered to be taken off the file, because it was evasive and illusory, the defendant who had filed it was ordered to pay all the costs and expenses occasioned by it.² Where, also, the suit, though ostensibly for specific performance, was, in the opinion of the Court, collusively filed for a different object, the bill was dismissed with all costs, charges, and expenses properly incurred by the defendant in reference to the suit.³

Under the former practice of the Court, there were many expenses necessarily incurred in the prosecution of the suit which were not allowed in taxations as between party and party; but it is now provided by order 307 that "Where costs are to be taxed as between party and party, the Master may allow to the party entitled to receive such costs, the like costs, as are taxable where costs are directed to be taxed as between solicitor and client, in respect to the following matters:—

- "I. Advising with counsel on the pleadings, evidence, and other proceedings in the cause;
- "II. Procuring counsel to settle and sign such pleadings and petitions as may appear to have been proper to be settled by counsel;
- "III. Procuring and attending consultations of counsel;
- "IV. The amendment of bills;
- "V. On proceedings in the Master's office;
- "VI. Supplying counsel with copies of or extracts from necessary documents."

And order 308, that "In allowing such costs, the Master is not to allow the party any costs which do not appear to have been necessary or proper for the attainment of justice, or for the defending his rights; or which appear to have been incurred through over-

¹ *Farquharson v. Balfour*, T. & R. 184, 206.

² *Read v. Barton* 3 K. & J. 166: S. C. *nom. Reid v. Barton*, 3 Jur. N. S. 268.

³ *Simpson v. Malherbe*, 18 W. R. 887, V.C.S.; and see *Cooke v. Cooke*, 11 Jur. N. S. 533: 13 W. R. 607, L. C.

caution, negligence, or mistake, or merely at the desire of the party."

Order 306 provides that "If upon the taxation of costs it should appear to the Master that any proceedings have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, it shall be the duty of the Master to disallow the costs of such proceedings, as well on the taxation of costs between solicitor and client, and as between solicitor and client, as on a taxation between party and party, unless the Master shall be of opinion that such proceedings were taken by the solicitor because they were in his judgment reasonably exercised, conducive to the interest of his client. It shall not be the duty of the Master, on a taxation of costs between a solicitor and his client, to disallow to the solicitor his costs of such proceedings where it is made to appear that such proceedings were taken by the desire of the client, after being informed by his solicitor that the same were unnecessary and not calculated to advance the interests of the client; but the cost of such proceedings are not to be allowed in any case where, according to the present practice and rules of taxation, the same would not be allowed."

Where on an application by a solicitor for a taxation of his bill of costs, the client disputed the retainer as to the whole bill, and also set up the Statute of Frauds, it was held that the Court had jurisdiction to refer these defences to the Master. An order, of course, for the taxation of costs is not to be discharged for the omission therefrom of any reference to defences of which the petitioners had no previous intimation.¹ A counsel fee on hearing is not taxable until the cause has been set down for hearing, and notice of hearing given.² Where there were two suits by a solicitor for the same object, the Master refused in one of the two suits without a special order to tax as between party and party, more than part of the costs; and it appearing that as between solicitor and client no part of that bill could have been recovered, the Court refused to interfere with the taxation.³

¹ *Re Bacon*, 3 Cham. Rep. 79.

² *Dewar v. Orr*, 3 Cham. Rep. 141.

³ *Spence v. Clemen*, 15 Grant, 584.

Method of Taxation.

There are two methods in which the order as to the taxation of costs may be drawn up,—sometimes it is referred to the Master to tax the costs, and at other times the taxation is only referred to him “in case the parties differ about the same.”

Where the Court refers it to the Master to tax the costs of a party, the solicitor of the party who is to have them, must deliver a bill of his costs to the Master, who is to tax them, and who furnishes the other side, if desired, with a copy. The attendance of the parties interested, or the solicitors, at the taxation, is enforced by warrant, in the same manner as their attendance upon other references, which must be renewed as often as may be necessary till the completion of the taxation.¹

Where the decree orders a party to retain his costs, when taxed, out of the balance in his hands, and to pay the residue into Court, if he delays to get the costs taxed, the proper course is for the other party to move that he may bring his bill of costs to be taxed within a limited time.²

Where a Master is directed to tax costs, “in case the parties differ about the same,” the order of proceeding is pointed out by the English 57th order of 1828, as amended in 1881, and is as follows : “The party claiming the costs must bring the bill of costs into the Master’s Office, and give notice of his having so done to the other party ;³ and, at any time within eight days after such notice, such other party shall have liberty to inspect the same, without fee, and may take a copy thereof, if he thinks fit ; and must, at or before the expiration of the eight days, or such further time as

¹ Prac. Reg. 146.

² *Newsome v. Shearman*, 2 S. & S. 95. In this case the application was, that the defendant might pay the whole sum due from him into Court ; but the motion was refused as inconsistent with the order.

³ In *Aubrey v. Hooper*, 5 Russ. 1, it was insisted, that, by the practice as it existed before the order, the party claiming the costs ought not to carry in his bill to the Master, till he has given the other side an opportunity of examining the same, by furnishing him with a copy of it ; and it was contended that the same practice ought to continue under the new order ; but, from a certificate of the Clerks in Court then produced, it appeared that, under the old practice it was not incumbent upon the party claiming the costs, to take a bill of costs to the party required to pay the same ; or to his solicitor, but the party claiming the costs was at liberty to take the bill of his costs into the Master’s Office in the first instance, and it was the practice of the Master’s Office to proceed in the taxation of such a bill, as in any other ordinary case, upon warrants being taken out for that purpose. The Court, therefore, decided that, under the new order, the party to recover the costs need not to give to the other party a copy of his bill before carrying it to the Master’s Office.

the Master shall in his discretion allow, either agree to pay the costs or signify his dissent therefrom, whereupon he shall be at liberty to tender a sum of money for the costs ; but, if he makes no such tender, or if the other party refuses to accept the sum so tendered, the Master is then to proceed to tax the costs, according to the practice of the Court ; and, in case the taxed costs shall not exceed the sum tendered, then the costs of the taxation are to be borne by the other party.

An order directing the costs of a suit to be taxed, warrants the taxation up to the time of the Master's making his report,¹ and this it has been held to do, notwithstanding a reservation of subsequent costs, "not provided for by the decree," there being other costs by which these words might be satisfied.² Where subsequent costs are not intended to be given, the direction should be confined to costs up to the decree, and the question as to subsequent costs should be reserved.³

An order directing the taxation or payment of costs by two or more parties, is joint and several, and, if one of them dies, the costs may nevertheless be taxed and recovered against the others;⁴ therefore, where, in a suit by several plaintiffs, the costs of the defendants were ordered to be taxed and paid by the plaintiffs, one of whom died, but the Master, nevertheless, proceeded with the taxation of the costs, an application to quash the Master's certificate was refused, the Court being of opinion that the proceeding was regular.⁵ Upon the same principle, in a tithe suit, where there was a general decree for the taxation and payment of costs by all the defendants, and they all died, but one, an application by the survivor to have the costs of the defendant apportioned, so as to relieve him from the costs of the other defendants, was refused.⁶

A bill of costs should be prepared from the entries of payments and attendance in the solicitor's own books.⁷

The plaintiffs, however numerous, can have but one bill of costs: and the same rule applies to defendants appearing by the same

1 *Quarrell v. Beckford*, 1 Madd. 286, and *vide Clutton v. Pardon*, T. & R. 301, 4.

2 *Quarrell v. Beckford*, *ubi supra*.

4 *Vide Poole v. Franks*, 1 Moll. 78.

6 *Michel v. Bullen*, 6 Price, 87.

7 2 *Smith*, Pr. p. 644.

3 *Ibid. et vide Seton on Decrees*, 40.

5 *Meredyth v. Hughes*, 3 Y. & J. 183.

solicitor, however large their number, or however diversified their interests: thus, if one solicitor is concerned for any number of defendants, whatever their interests may be, he is only entitled to one bill of costs for them all, although he may, in that bill, charge for separate answers of any of them, or for the employment of separate counsel, for any of them at the hearing. In such cases, however, he can charge only one attendance in Court for all of them.¹

If one or more of several defendants, defending by the same solicitor, present a petition, and the rest, having a different interest to the petitioners, cannot join in the petition, but appear upon it to consent or to submit to the order of the Court, and all are ordered to have their costs of the petition, the solicitor can only be allowed one bill of costs; nor can he be allowed for separate attendances in Court, but only for separate briefs and separate fees to and attendance upon counsel.²

If a town solicitor happens to be concerned as agent for two different solicitors in the country, or if he himself is properly concerned for some defendants and as agent for others, the case is different, and he will be allowed to bring in two bills of costs; but he must, from the beginning of the suit, keep the defences separate, and take double copies of the bill, &c., as if two solicitors were employed; if he does otherwise, he will be allowed only one bill of costs, and the two solicitors in the country must divide the fees between them.³

In taxing costs, the Master is the sole judge of the fact, whether the business has been done, and of the proper charge to be made, and his decision upon this subject is final. It is also the Master's duty to inquire, whether the business was required to be done; for if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings.⁴

When it is referred to the Master to apportion the costs of a suit, where part of them only are given to the plaintiff, and no costs are

¹ 2 *Smith*, Pr. 648.

² *Ibid.*

⁴ *Allop v. Lord Oxford*, 1 M. & K. 565.

³ *Ibid.*

given as to the rest, in this case, the Master looks over all the folios of the bill, answers, depositions and proceedings, and only the usual fees of such folios and proceedings as relate to the matter prevailed in are allowed.¹ In doing this, however, the proper course appears to be, to apportion the costs of all the general proceedings in the cause, so that the party receiving the costs should have a fair proportion of the costs of each proceeding, and not merely those costs which were occasioned by the particular portion of the proceedings of which he is to have the costs. This principle was adopted in a recent case, where, in a suit for the administration of assets, the executor was charged with interest on the balances in his hands, and it was referred to the Master to tax the plaintiffs their costs, as to so much of the suit as ought to charge the executor with interest. The Master, in his taxation of the costs, allowed the plaintiff a portion of every general proceeding in the suit, whereupon the executor presented a petition complaining of the taxation, and insisting that he ought to have been charged with so much only of the costs of the suit as related to the question of interest; but the Master of the Rolls, (Lord Langdale,) acting upon the certificate of several of the most experienced Clerks in Court, who were not concerned in the cause, held that the principle of taxation which had been adopted was right, and dismissed the petition with costs.²

Where one solicitor appears for three several defendants, and the bill, as to one of them, is dismissed with costs, the plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that defendant, and one third of the costs of the proceedings taken for all three defendants.³ And it has been held, that where a solicitor appears in a suit for several defendants, one of whom is entitled to his costs out of the fund, and the others not, the costs of the one entitled, are only that proportion of the costs due to the solicitor, with which the solicitor, as between the co-defendants for whom he has acted, could have charged the party entitled.⁴

¹ For. Rom. 206.

² *Heighington v. Grant*, 1 Beav. 228. *Vide etiam* the mode of taxation adopted in that case, as set out in Mr. Mills' certificate, *ib.* 231, and 2 *Smith's Pr.* 340, 2 ed.; *vide etiam Pitt v. Mackreth*, 3 Bro. C. C. 321.

³ 2 *Smith's Pr.* 642. A defendant to a suit in Chancery, appearing by the same solicitor that is employed for other defendants, is not liable to such solicitor for more than his own share; but plaintiffs in a suit are jointly and severally liable to their solicitor, for the whole costs of the suit; *ib.*

⁴ *Harmer v. Harris*, 1 Russ. 157.

Order 815 provides that "where two or more defendants defend by different solicitors under circumstances that, by the law of the Court, entitled them to but one set of costs, the taxing officer, without any special order from the Court, is to allow but one set of costs: and if two or more defendants, defending by the same solicitor, separate unnecessarily in their answers, or otherwise, the taxing officer is, without any special order of the Court, to allow but one answer and set of costs." It has been held that the first part of this order applies to cases where several persons are acting in the same interest, and where costs are to be apportioned among them. It does not empower the Master to deprive any one of his entire costs where the decree gives costs generally. A surviving trustee, and the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them.¹ Order 554, as to filing a certificate of the applicability of the lower scale tariff, is directory; and the omission of it does not entitle a defendant, in case of the dismissal of the bill, to the higher scale costs, except for fees of Court actually paid.² A counsel fee on hearing is not taxable until the cause has been set down for hearing, and notice of hearing given.³ If a cause irregularly set down for hearing by the plaintiff be struck out upon defendant's motion in Chambers with costs, this entitles the defendant to tax costs of the application only, and not the costs of preparing for hearing.⁴

It is to be noticed, that if, upon the taxation of costs, it should be made to appear, that the person who acted as solicitor for either of the parties, had not, at the time such costs were incurred, been admitted a solicitor of the Court, the Master may disallow the whole of such costs, except disbursements to the Clerk in Court, although they have been actually paid by the party,⁵ even though the costs may have been incurred in a case for the opinion of a Court of Law, directed out of this Court,⁶ or upon an arbitration under an order of the Court;⁷ and the person acting as solicitor,

1 *Reid v. Stephens*, 3 Cham. Rep. 372; and see *Spencer v. Clemens*, 15 Grant, 584.

2 *Ferguson v. Rutledge*, 15 Grant, 511. As to costs in suing *in forma pauperis*, see *Casey v. McColl*, 3 Cham. Rep. 24.

3 *Deane v. Orr*, 3 Cham. Rep. 141.

4 *Frietsch v. Winkler*, 3 Cham. Rep. 141.

5 *Preble v. Boghurst*, 1 R. & M. 744. If the Master, upon the objection being taken, refuses to disallow the costs, the Court will, upon petition, direct him to review his report, and to disallow the costs in question; *Sumner v. Ridgway*, *id.* 748.

6 *Preble v. Boghurst*, 1 R. & M. 744.

7 *Ibid.*

had been admitted an attorney-at-law, and has since been admitted a solicitor of the Court.¹ And it seems that, even if the fact, that the party was not a solicitor, should be discovered after the costs have been taxed and paid, the Court will entertain a petition to have them refunded.²

[It is stated, by Lord Chief Baron Gilbert,³ that, “by an order of the Court, made in my Lord Keeper Wright’s time, no exceptions were allowed to a report of taxing costs;” and “that this rule hath ever been pursued, but with this difference, that where the Master allows such costs as ought not to be allowed, or are not allowable by law,—in this case, the Court will, sometimes, indulge the party with liberty of excepting, touching this point only; but this very seldom or ever falls out, though in some cases it hath been done.”]

The rule acted upon at present, is very nearly the same: and, generally speaking, it is held, that the Master’s report as to costs is final, and that exceptions do not lie to it;⁴ for the Master is much more competent than the Court, to determine the proper amount of charges. When, however, it said, that the Master’s report as to costs is final, the *dictum* must be understood as applying only to the *quantum* of costs allowed or disallowed by the Master.⁵ If the Master has omitted to tax the costs which have been directed to be taxed, or if it is conceived that in taxing them he has adopted some general principle which cannot be supported, the party complaining has a right to bring that point before the Court.⁶

The question, in what manner an objection to the Master’s report of costs is to be brought before the Court, is one which has given rise to considerable discussion.

In *Pitt v. Mackreth*,⁷ Lord Thurlow said, that an exception had never been allowed for costs only; and that the regular method was, to state the articles the party meant to object to, in a petition.

¹ *Prebble v. Boghurst*, 1 R. & M. 744.

² *Coates v. Hawkyard*, 1 R. & M. 746.

³ For. Rom. 206.

⁴ *Lucas v. Temple*, 9 Ves. 299; *Fenton v. Crickett*, 3 Madd. 496; *Alwop v. Lord Oxford*, 1 M. K. 564.

⁵ *Holbecke v. Sylvester*, 6 Ves. 417.

⁶ *Shewell v. Jones*, 2 S. & S. 172.

⁷ 3 Bro. C. C. 321.

and to pray leave to except. In *Holbecke v. Sylvester*,¹ a similar doctrine was laid down by Lord Eldon, who said, he understood the practice to be, that if the Master has proceeded upon the costs, but has not allowed several items which are claimed, there must be a petition;² and this appears to be now the general course of proceeding in cases where objections are taken to the principle upon which the Master acted in the taxation of costs.³

In *Holbecke v. Sylvester*,⁴ a distinction was attempted at the bar, between cases in which there is an exception for costs only, and those in which the party excepts upon any other ground; in which cases, it was contended, he may add an exception for costs; but in *Lucas v. Temple*,⁵ Lord Eldon expressed doubts as to that distinction, and, observing that frivolous objections would be taken merely for the sake of objecting for costs, said his opinion was, that exceptions would not lie for *items* of costs which were items properly falling within the description of those costs which the Master was to tax. It is to be observed that, in the above case, Lord Eldon lays stress upon the circumstance, that the objection was to *items* of costs falling within the description of those costs which the Master was to tax; if the decree has directed costs, and the Master has not taxed them at all, you may except; this distinction was taken by his Lordship himself, in *Holbecke v. Sylvester*, before referred to.

It is to be noticed, that the application to the Court, to review a Master's certificate of taxation, must be by petition, specifying the *items* objected to, and praying for leave to except to the report, and that a motion for leave to except will not be regular.⁶ But, although the general form of application to the Court is by petition for liberty to except, the practice of the Court, if it concur with the view taken by the petitioner, is not to put him to take exceptions, but to refer it back to the Master, with directions to

¹ 2 G. Ves. 417.

² It is remarkable, that, in the above case, his Lordship allowed an exception which had been taken to the Master's report, on the ground that, in taxing the costs of the plaintiffs (mortgagees) relating to their mortgages, he had disallowed the costs occasioned by making certain persons, who were necessary parties, defendants. It may be that he considered that such disallowance was, in fact, an omission to tax part of the costs, which were directed by the decree to be taxed.

³ *Vide* observations of Sir W. Grant, M.R., in *Purcell v. McNamara*, 12 Ves. 170; *Fenton v. Crickett*, 3 Madd. 496; *Ex parte Leigh*, 4 Madd. 394; *Shewell v. Jones*, 2 S. & S. 170-172; *vide etiam Russell v. Buchanan*, 9 Sim. 167.

⁴ *Ubi sup.*

⁵ 9 Ves. 299.

⁶ *Attorney-General v. Brown*, 1 M. & K. 567.

review his report, and to make such alteration in it as the justice of the case may require.

Enforcing the Payment of Costs.

In England costs are recovered by *subpœna*, on which an attachment may issue ; or by writs of *fi. fa.*, *Elegit*, or *Sequestration*.

In this Province no imprisonment can be made for the non-payment of money ; and costs are recovered as other moneys directed by the Court to be paid. The reader is referred to a former part of this treatise, where the sec. 19 of the Arrest and Imprisonment Act (Con. Stat. U.C., ch. 24) is quoted, with the decisions under it.

CHAPTER XXXIV.

REHEARINGS AND APPEALS.

Generally.

Where a party feels himself aggrieved by a decree or order of the Court, there are three modes by which he may seek to have it either reversed or varied: namely, 1. By a rehearing in the Court of Chancery; 2. By an appeal to the House of Lords; and 3. By a bill of review.

That is the English practice. In this Province, the appeal to our Court of Appeal stands in the place of the appeal to the Lords in England; and our Order 6 abolishes bills in the nature of bills of review, as well as bills to impeach decrees on the ground of fraud; bills to suspend the operation of decrees; and bills to carry decrees into operation; but provision is made by Order 380, and several subsequent ones for proceeding by petition in cases where, under our former, and the present English practice, a bill of review, or a bill in the nature of a bill of review, would be used. The practice under those orders will be considered in another part of this work. It may here be mentioned, however, that the principles which guide the English Court in proceeding by bill of review are those which guide our Court—the only difference being that in England the proceedings are by bill; with us by petition. With this explanation the English cases now to be cited will be read without misapprehension.

Except in the instances already mentioned, a decree or order made by consent cannot be the subject of appeal.¹

¹ *Stewart v. Forbes*, 1 McN. & G. 187: 13 Jur. 523; *Dodson v. Sammell*, 8 W. R. 252, V. C. K.: see also *Cole v. Scott*, 1 McN. & G. 518, 523, 526. As to what are consent orders, see *Davis v. Chanter*, 2 Phil. 545: 1 C. P. Coop. & Cott. 285: 10 Jur. 975; and for observations on the impropriety of a party appealing from an order which he has not opposed in the Court below, see *Christ's Hospital v. Granger*, 1 McN. & G. 460, 462: 14 Jur. 389.

Where, upon a demurrer for want of parties, the demurrer was allowed, with liberty to the plaintiff to amend, the plaintiff, by undertaking, in the order, to amend within three weeks, did not lose his right of appeal.¹

It seems that a party, dissatisfied with a decree, will not prejudice his right to appeal, or to have the cause reheard, by consenting to an order consequential upon the decree.² Indeed, the general rule of the Court being, that an appeal or a rehearing does not suspend the proceedings under a decree, it would be absurd to say that, if a party, in order to save the expense of a contest upon a point which, supposing the decree to stand, he could not sustain, should obey the decree, by consenting to an order consequential upon it, he is by such obedience to be deprived of his right to have the case reheard.

Where an agreement had been signed by the parties, and by consent made an order of the Court, to submit to such decree as the Court should make, provided it should be on the merits, and not on any mistake in the pleadings, and that neither party should bring an appeal: notwithstanding which, one party petitioned for and obtained, from Lord King, an order for a rehearing; Lord Talbot, although he expressed doubts whether, if the agreement had been disclosed to the Court originally, the order for a rehearing would have been made, yet, as his predecessor, who heard the cause, had ordered a rehearing, and thereby shown he was not satisfied with the decree, he refused to discharge it.³

It is not necessary that the person who appeals should be actually a party to the record: provided he has an interest in the question which may be affected by the decree or order appealed from. Thus, a rehearing of an order made on petition was directed at the instance of a person who had not been served with it, but who offered new evidence, and was substantially the only person interested in supporting the contention which it tended to prove.⁴ Persons who have been served with notice of,⁵ and creditors com-

1 *Lidbetter v. Long*, 4 M. & C. 236, 288; *Davis v. Chanter*, 2 Phill. 545; 1 C. P. Coop. & Cott. 286: 10 Jur. 978.

2 *Wood v. Griffith*, 1 Mer. 35, 38.

3 *Buck v. Fawcett*, 3 P. Wms. 242.

4 *Jopp v. Wood*, 33 Beav. 372.

5 *Ellison v. Thomas*, 1 De G. J. & S. 18; *Kidd v. Cheyne*, 18 Jur. 343, V. C. W.

ing in under a decree, have been held entitled to rehear the cause, though not parties to the bill: because the decree affected their interest;¹ but a person not a party to the record must first obtain from the Court permission to apply for a rehearing.²

In *Hungerford's case*,³ the creditors complained, that the property had not been applied as it ought: it was objected, that they could not come in under the decree, and impeach it; but it was answered that they might: for, if the decree contained itself a wrong disposition of the property, they, coming in as creditors, had a right to appeal, because the decree bound their rights. In *Osborne v. Usher*,⁴ the same principle was admitted; and it was held, that if the right of a remainder-man, or of any person entitled to the estate in any way, is bound by the decree, he must have a right to appeal from it, as well as the person against whom it was made. Upon this ground, it has been held that a tenant in tail, in remainder expectant after the determination of a prior estate tail (who would not be a necessary party to a suit affecting the entailed estate, against the prior tenant in tail), has a right to appeal against the decree in that suit; and that he may file a supplemental bill, for the purpose of making himself a party to the suit, in order to appeal from it.⁵

It has also been determined, by the House of Lords, that a purchaser under a decree, though no party to the suit, may appeal from an order setting aside a bidding, and ordering a new sale;⁶ and it has been held, that a creditor coming in under a decree, and having his claim disallowed, may appeal from the order disallowing it.⁷

It is only, however, in cases in which the interest of the party, wishing to appeal, will be bound by the decree, that a rehearing or appeal will be permitted, at the instance of an individual not on

1 *Giffard v. Hort*, 1 Sch. & Lef. 409.

2 *Berry v. Attorney-General*, 2 McN. & G. 16; *Guynne v. Edwards*, 9 Beav. 22, 34; *Hogson v. Smithson*, 4 W. R. 699, L. J. J.; *Parmiter v. Parmiter*, 3 De G. F. & J. 526; but it seems that a shareholder, not named as a party to the proceedings, may apply to the Court to vary or discharge a winding-up order, without applying for leave to rehear: *Re Anglo-Cath. Cornish Gold Mining Company*, 1 Dr. & Sm. 628, 632; 8 Jur. N. S. 129; and see *Seton*, 1154.

3 Cited, 1 Sch. & Lef. 409.

4 *Ibid.*; 6 Bro. P. C. ed. Toml. 20.

5 *Giffard v. Hort*, 1 Sch. & Lef. 411; but see *Osborne v. Usher*, *ubi sup.*; where such an appeal was sustained, although it does not appear that any supplemental bill was filed.

Ryder v. Earl Gower, 6 Bro. P. C. ed. Toml. 306; *Barlow v. Osborne*, 6 H. L. Ca. 556; 4 Jur. N. S. 367.

7 *Earl of Winchelsea v. Garetty*, 1 M. & K. 258, 257.

the record : in no other case can he have ground to complain of the decree or order.¹

A party who is poor is entitled to prosecute or defend an appeal or a rehearing, *in forma pauperis*, in the same manner that he has a right to sue, and be sued, in that character.² In the House of Lords, a poor person may also be admitted to sue or defend *in forma pauperis*.³

The grounds upon which a party may appeal from a decree or order of the Court, or have it re-heard, are as numerous and various as the cases themselves ; and cannot therefore be pointed out in detail. In fact, wherever the Court is called upon to determine a question of Law or of fact the decision may be the subject of a rehearing or appeal, by any party, bound thereby, who considers himself aggrieved by it. The only case in which a party cannot appeal from the decision of the Court is, where the determination complained of is merely the result of the exercise of discretion on the part of the Judge, in a case where the matter was fairly a subject for the exercise of discretion : in such cases the practice of the Court will not allow an appeal from the discretion of one Judge to that of another.⁴

Upon this ground it is, that the Courts have adopted the rule, that there can be no rehearing or appeal upon the question of costs.⁵ The foundation of this rule, as stated by Lord Hardwicke, in *Owen v. Griffith*,⁶ is to prevent vexation and trouble : for, as cases in Equity often depend on abundance of circumstances, about which the reason of mankind might differ, the question of costs would, if it could be laid open generally, create perpetual appeals. The operation of the rule, however, is strictly confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill ; and it is

¹ *Earl of Winchelsea v. Garetty*, 1 M. & K. 253, 257.

² *Bland v. Lamb*, 2 J. & W. 402.

³ *Macqueen's H. L. Prac.* 259.

⁴ There is, therefore, no appeal from an order directing a question of fact to be tried before the Judge and a special jury ; *Scrubssole v. Schneider*, 12 W. R. 359, L. C.

⁵ As to appeals for costs, see *Morgan & Davey*, 105.

⁶ 1 Ves. 8, 250 ; and see *Widman v. Kent*, 1 Bro. C. C. 140 : 2 Dick. 594 ; *Williams v. Begmon*, cited 2 Dick. 595 ; and *Beames on Costs*, App. No. 10. It is to be noticed, that the case of *Gould v. Granger*, in Moseley, 395, which, from the statement of it there, appears to be at variance with the rule laid down, is incorrectly reported : the question having been not as to the costs of the cause, but as to the costs of the conveyance of the estate ; see *Beames on Costs*, App. No. 12 : and *Angell v. Davis*, 4 M. & C. 363.

liable to exception, where any principle is involved;¹ or where the costs are payable out of a fund; or are chargeable upon an estate; or are part of the relief to which a party is entitled, and the facts of the case distinctly appear upon the face of the proceedings themselves: so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits.² Upon this ground, in the case of *Owen v. Griffith*, above cited, Lord Hardwicke entertained an appeal by an incumbrancer: who had brought his bill to compel the payment of his charge, out of an estate which he had extended by *elegit* upon a judgment, and to whom the Judge below had refused his costs, although he had given him his principal and interest: his Lordship holding, that an incumbrancer upon an estate for a just debt has a lien upon the estate for his costs, as well as his demand; and that, therefore, the appeal, although for costs, affected the merits of the case.³

The same distinction was recognized, by Lord Northington, in *Cowper v. Scott*,⁴ and by Lord Eldon, in *Jenour v. Jenour*.⁵ In the latter case, the question arose upon the interest of the parties in a trust fund, which had been separated from the general residue, and the bill prayed, that the costs of the suit might be paid out of the general estate: upon the hearing, the costs were ordered to be paid out of the general estate; but on an appeal, although the decree of the Master of the Rolls, upon the right to the fund, was affirmed, Lord Eldon corrected the decree, as to costs, by directing them to be paid out of the particular fund, and not out of the general estate: holding, that the costs were not within the common rule.

So, in *Taylor v. Popham*,⁶ Lord Eldon states the rule to be that where the costs are disposed of, as subjects of relief: though they are the subject of appeal, it is not an appeal for costs only. In that case, a creditor had a contingent lien upon a particular fund: which had been appropriated to answer it; and an order of Lord Erskine had given, to the solicitors in the cause, a lien for their

¹ *Perks v. Stothert*, 11 W. R. 1016, V. C. K.; *Chappell v. Gregory*, 2 De G. J. & S. 111.

² *Angell v. Davis*, 4 M. & C. 360, 366; *Chappell v. Purday*, 2 Phill. 227, 229; 11 Jar. 266; *Horn v. Coleman*, 5 W. R. 409, L.J.J.; *Re Cant's Estate*, 1 De G. F. & J. 153; 6 Jur. N. S. 153; *Corporation of Rochester v. Lee*, 2 De G. M. & G. 427, 430; *Chappell v. Gregory*, *ubi sup.*; and see *Colliard v. Roe*, 7 W. R. 523, L. C. & L.J.J.; *Seton*, 1157.

³ See *Angell v. Davis*, 4 M. & C. 368; *Norton v. Cooper*, 5 De G. M. & G. 723.

⁴ 1 Eden, 17; S. C. *nom. Cooper v. Scott*, 1 Bro. C. C. 141, n.

⁵ 10 Ves. 562, 572.

⁶ 15 Ves. 72; and see *Heighington v. Grant*, 1 Phill. 600.

costs, upon the fund generally.¹ The question on the appeal was, whether they should have those costs out of the appropriated fund, in preference to the party having the contingent claim upon it; and Lord Eldon's observation upon the question is: "It is quite competent to rehear or appeal upon such a point concerning costs as this: the Court having given costs, has applied the fund of the party to a payment to which it ought not to have been applied."² The same distinction was acted upon by Lord Lyndhurst, in *Barkett v. Spray*;³ and was much considered and approved of by Lord Cottenham, in *Taylor v. Southgate*,⁴ *Eyre v. Marsden*,⁵ and *Angell v. Davis*.⁶ In the last of which cases, his Lordship founds his judgment upon three very important circumstances which appeared in the case: any of which, his Lordship held, would have been sufficient to sustain the appeal: 1st. The bill prayed, that the defendant might restore the property in question, and pay the costs: asking the payment of the costs, by way of special relief;⁷ 2ndly. The case was one, in which the proceedings themselves, without going into the details of the transaction, furnished all the information necessary for the purpose of determining the question; and, 3rdly. It was not a case of personal costs, in which the Court had ordered one party to pay them; but a case in which the Court had directed them to be paid out of a particular fund.⁸

In a subsequent case, Lord Cottenham held, that as a party interested in a fund, might appeal from a decree directing costs to be paid out of that fund, so persons personally ordered to pay costs might appeal from the decree, on the ground that the costs ought to be paid out of the fund.⁹ The case alluded to was an appeal from a decree of Sir Lancelot Shadwell, V.C., with regard to the right to a certain fund in Court, which was claimed by a married woman against her husband, as property settled to her separate use. The Vice-Chancellor held, that the fund belonged to the wife; and ordered the costs of the suit to be paid by the husband, and the trustees of the settlement. From this decision two petitions for a rehearing were presented: one by the husband, and the other

1 See 13 Ves. 50, 61.

4 4 M. & C. 205.

7 In *Lancashire v. Lancashire*, 2 Phill. 667; 661, 662, this was held insufficient; see also *Umpleby v. Waverley Valley Railway Company*, 1 J. & H. 264.

8 4 M. & C. 362, 366.

9 *Ragot v. Ragot*, L. C. July, 1840, MSS.

2 See 15 Ves. 78.

5 *Ibid.* 231.

3 1 R. & M. 112, 115.

6 *Ibid.* 260.

by the trustees. It was objected, at the rehearing, that the petition of the trustees, being in effect merely an appeal for costs, could not be proceeded with; but Lord Cottenham held, that an appeal for costs, under such circumstances, might be sustained; and allowed the argument to go on.

Another exception to the general rule as to costs, is afforded by a decision¹ in the House of Lords: which, although made upon the hearing of an appeal from the Court of Session in Scotland, may be cited as applicable to all cases, English as well as Scotch. In that case, it was held, that though an appeal for costs only will not lie, when costs are in the discretion of the Court, yet, where the Court is directed, by an Act of Parliament, to give costs, it is a proper subject of appeal, if they are not given according to the requisition of the Act.

The above instances form the only exceptions to the general rule of the Court, that there can be no rehearing or appeal for costs. This rule is so strictly adhered to that the Court will not permit it to be evaded, by coupling the appeal for costs with another ground of appeal, which is unfounded, for the mere purpose of giving colour to the appeal for costs. Thus, where the ground of the rehearing was, that a defendant, charged by the decree with a sum of money, ought also to have been charged with interest and costs, the Court was of opinion that the decree was correct as to interest, which ought not to have been given; but that the decree was wrong in not charging the defendant with the costs; and as the claim of interest was unfounded, the costs were the only thing in question: the decree was therefore affirmed, on the ground that a rehearing does not lie for costs.²

The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties; where, therefore, an appeal was made to the Court of Error and Appeal from an order directing the taxation of a solicitor's bill against his client in a particular mode, the Court dismissed the appeal with costs.³

¹ *Tod v. Tod*, 1 Bligh, N. S. 689; and see *Re Gregson*, 13 W. R. 128, L.J.J.

² *Williams v. Reynon*, Beames on Costs, App. No. 10; see also *Widman v. Kent*, 1 Bro. C. C. 140.

³ *Re Freeman Craig & Proudfoot*, 2 E. & A. R. 199.

It must not, however, be assumed, from the case last quoted, that, in all cases where the appeal for costs is coupled with other grounds of appeal, the Court will, if it affirms the decree upon the other grounds, refuse to interfere upon the question of costs, if it considers the decision below upon that point to have been wrong : on the contrary, many cases have occurred in which decrees have been varied as to costs, though affirmed on every other point.¹ The rule, as to this, is very distinctly laid down by Lord Lyndhurst, in *Attorney-General v. Butcher*,² where his Lordship says : "If a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed in the substantial ground of appeal ; but if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. A point is not to be put forward as a ground of appeal, merely for the purpose of covering an appeal on the question of costs."

A party will not be allowed to appeal piecemeal : that is, he cannot appeal from part of a decree by one petition, and afterwards appeal from another part, by another petition. The rule is, that if a party appeals from a part of a decree, he admits the remainder to be correct.³

An order for a rehearing or an appeal does not stop or hinder any proceedings on the decree or order appealed from, unless by special order of the Court ; but the person in possession of any decree or order is at liberty to proceed thereon, as if no appeal or rehearing had been granted.⁴ Therefore, if a bill is dismissed with costs, the defendant may, notwithstanding an appeal, proceed to recover his costs.⁵ So, also, it has been held, that the circumstance of an appeal depending, is not a reason against the plaintiff filing a supplemental bill for the purpose of carrying it into effect.⁶ It

1 *Jenour v. Jenour*, 10 Ves. 562, 578 ; *Pitt v. Page*, 1 Bro. P. C. ed. Toml. 1 ; *Squires v. Pershall*, 3b. 396 ; *Wakett v. Raby*, 2 ib. 386 ; *Maguire v. Madden*, ib. 398 ; *Lewis v. Smith*, 1 Ma. & G. 417, 421 ; *Reynell v. Sprye*, 1 De G. M. & G. 600, 638 ; *Power v. Reeves*, 10 H. L. Ca. 645.

2 4 Ru. 180.

3 *Norbury v. Meade*, 3 Blgh. 261 ; and see *Parker v. Morrell*, 2 Phill. 453, 461.

4 See *Gwynn v. Lethbridge*, 14 Ves. 686 ; *Waldo v. Caloy*, 16 Ves. 208, 212, 215 ; *Willan v. Willan*, ib. 216 ; *Seton*, 1157 ; see also *Wood v. Farthing*, 8 W. R. 425, L. O.

5 *Tyson v. Cox*, 3 Madd. 278 ; *Dunster v. Milford*, cited 3 Madd. 278 ; *Archer v. Hudson*, 8 Beav. 521 ; *Bainbridge v. Baddeley*, 10 Beav. 86.

6 *Woodward v. Woodward*, 1 Dick. 83.

is, also, a general rule, that a party does not lose the right of appeal, by acting on an order.¹

The Court, however, will, in some cases, upon special application of the appellant,² suspend the proceedings under a decree or order pending a rehearing or appeal. Thus, it has been held, that although a party may proceed to recover his costs, the Court will, when the appeal is lodged before any step taken, order the proceedings to be suspended.³ Similar applications have, however, been refused.⁴

The Courts, however, are very unwilling to suspend the execution of decrees; and will not do so, except in cases where there is danger of the object of the appeal being defeated, before the appeal can be heard. Where that is the case, the Court will suspend the execution of a decree or order, pending an appeal: thus, where the object of a demurrer is to take the opinion of the Court upon the liability of a party to make the discovery required by the bill, the Court will suspend proceedings to enforce an answer, pending the appeal from an order overruling the demurrer.⁵

So, also, where there would be danger of irreparable mischief.⁶ In cases of injunction, for instance, and, still more, of orders dissolving injunctions, an appeal ought almost always to be permitted to stay execution.⁷ Upon this ground, likewise, where the Court has directed the sale of property, it will suspend the sale;⁸ or where property of a perishable nature is ordered to be delivered up, it will direct security to be given for the amount of the property.⁹ And so, where specific performance of an agreement for a sale has been decreed, it will suspend the execution of the conveyance till after the appeal: although it will not suspend the other proceedings in Chambers.¹⁰ Where, also, a bill for specific

1 *Masterman v. Price*, 1 C. P. Coop. t. Cott. 358, and cases referred to, *ib.* 360, *et seq.*, particularly: *White v. Lisle*, 3 Swanst. 343; and *Brophy v. Holmes*, 2 Moll. 1; and see *Bustin v. Masters*, 2 Phill. 290; *Parker v. Morrell*, 2 Phill. 453, 462.

2 *Rowley v. Adams*, 9 Beav. 348; *Smith v. Earl of Eppingham*, 11 Beav. 82, 83.

3 *Dunster v. Mifford*, cited 19 Ves. 447; and see *Roberts v. Totty*, 19 Ves. 446; see also *Meads v. Norbery*, 4 Pri. 322.

4 *Roberts v. Totty*, 19 Ves. 446; *Herring v. Cloberry*, 12 Sim. 410, 412; *Pinkett v. Wright*, 4 Haro. 160.

5 *Wood v. Minter*, 1 J. & W. 636; *King of Spain v. Machado*, 4 Russ. 560; see, however, the judgment of Lord Lyndhurst, in *Garcias v. Ricardo*, 1 Phill. 498; and see S. C. 14 Sim. 523; *Walburn v. Ingilby*, 1 M. & K. 61, 79, 81.

6 See *Wood v. Griffith*, 19 Ves. 550; *Way v. Fay*, 18 Ves. 452.

7 *Walburn v. Ingilby*, 1 M. & K. 61, 84; but see *Galloway v. Mayor of London*, 11 Jur. N. S. 537; 13 W. R. 263, L.J.J.

8 *Nerot v. Burnand*, 2 Russ. 56; *Rowley v. Adams*, 9 Beav. 348.

9 *Nerot v. Burnand*, *ubi sup.* 10 *Gwynn v. Lethbridge*, 14 Ves. 585.

performance of an agreement for a lease had been dismissed, an action of ejectment was stayed on terms during the pendency of an appeal to the House of Lords.¹ It seems, however, that it is the duty of the Court to exercise its discretion, according to the circumstances of each particular case; and that no general rule can be laid down upon the subject.²

Where a bill seeking an injunction has been dismissed at the hearing, the Court of Chancery has no jurisdiction to make any order binding on the defendant, during the pendency of the plaintiff's appeal to the House of Lords; and if the plaintiff intends to appeal to that House, he should apply to have the order dismissing the bill so framed as to maintain the jurisdiction of the Court, pending the appeal.³

Although the effect of an order was to remove a stop placed on a large sum of money, which had been impounded in the Court of Common Pleas, and to enable the defendant to obtain uncontrolled possession of the fund, Lord Brougham refused to suspend the operation of the order till the hearing of the appeal.⁴ In commenting on that decision, in a later case,⁵ his Lordship observed, that, if the application was granted, it would really amount to deciding the matter the other way. "It would be all which the party opposing had contented for: it would give him the very stop upon the fund for which he had in vain been struggling, and expose his adversary to the delay against which he had successfully striven: it would be a reversal of the decision, under the form of staying execution."

The Court, also, has refused to suspend the distribution of a fund by a trustee for charitable purposes, pending an appeal, unless there is something, as to pecuniary means, in the situation of the party who has to make the distribution, which authorises an inference that, if he should thereafter be found to have made a wrong

1 *Pries v. Salusbury*, 11 W. R. 1014, M. R.

2 *Mayor, &c., of Gloucester v. Wood*, 3 Haro. 131, 153; 1 Phill. 493, 495; see also *McGregor v. Topham*, 4 Haro. 162; *Attorney-General v. Monroe*, 12 Jur. 318, L. C.; *Frederick v. Lushington*, ib. 886, L. C.; *Swift v. Grazebrook*, 8 McN. & G. 6; *Stanton v. Chadwick*, ib. 848; *Porter v. Damer*, 11 W. R. 809, V. C. K.; 12 ib. 691, L. C.; *Finch v. Shaw*, 20 Beav. 555; *Damer v. Mitford*, 9 W. R. 186, V. C. K.; *Lord v. Colvin*, 1 Dr. & Sm. 475; *De Mattos v. Gibson*, 1 J. & H. 79, 80.

3 *Galloway v. Mayor, &c., of London*, *ubi sup.*; and see *Oddie v. Woodford*, 3 M. & C. 584, 685.

4 *King of Spain v. Machado*, cited 1 M. & K. 85, n.

5 *Walburn v. Ingilby*, 1 M. & K. 61, 84.

distribution, he would not be able to furnish the means of setting it right.¹ So, also, where a legacy was ordered to be paid out of Court, and the decree was appealed from, the Court allowed it to be paid out, notwithstanding the appeal.²

Where, however, the circumstances make it expedient, the Court may require a party entitled to receive a sum of money or costs, to give security for the payment, if the decree should be reversed.

In like manner, where a decree was obtained by an equitable mortgagee, for the payment of principal, interest, and costs, within a fixed time, in default of which the estate was to be sold, the Court refused to suspend the execution of the decree; but gave six months, on the defendant's bringing the money into Court, consenting to a receiver, and paying the interest and costs: the plaintiff undertaking to repay, if the decree should be reversed.³

The Court will never suspend proceedings under the decree, on the mere ground that, if they are prosecuted, the parties will, if the decree is reversed, be put to unnecessary expense.⁴ Thus, it is not the habit of the Court to suspend the taking of an account.⁵ Nor will it suspend the proceedings under a decree directing the specific performance of a contract: at least, it will not go further than to direct the execution of the conveyance to be stayed.⁶

Rehearings and Appeals in the Court of Chancery.

Until recently in England rehearings in the Court of Chancery were, necessarily, either before the same Judge, or before the Lord Chancellor; but now, the Lord Chancellor, and the Lords Justices of the Court of Appeal in Chancery, constitute the Appellate Court.⁷ It is not, however, necessary that the Lord Chancellor should sit together with the Lords Justices; but all the jurisdiction,

¹ *Waldo v. Caley*, 16 Ves. 206, 216.

² *Way v. Foy*, 15 Ves. 452; and see *Swiss v. Lord Lowther*, 3 Hare, 428; *Swift v. Grassbrook*, 3 McN. & G. 6; *Gibbs v. Daniel*, 9 Jur. N. S. 632; 11 W. R. 663, L. J. J.; *Taylor v. Midland Railway Company*, 20 Beav. 219; *Monypenny v. Monypenny*, 8 W. R. 430, V. C. W.; *Rail v. Universal Marine Assurance Company*, 10 W. R. 327, L. J. J.; *Lord v. Colvin*, 1 Dr. & Sm. 475; *Mackintosh v. Great Western Railway Company*, 11 W. R. 1029, L. J.

³ *Monkhouse v. Corporation of Bedford*, 17 Ves. 320.

⁴ The appellant, however, upon a petition of rehearing, is always required to give an undertaking to pay such costs as the Court shall award, in respect of any proceedings had since the decree or order. *Price v. Denchurst*, 4 M. & C. 283; *Seton*, 1188; and see *Corporation of Gloucester v. Wood* 1 Phill. 408, 497.

⁵ *Nerut v. Burnand*, 2 Eum. 56, 58.

⁶ *Gwynne v. Lethbridge*, 14 Ves. 525.

⁷ 14 & 15 Vic. c. 83, s. 1.

powers, and authorities of the Court of Appeal may be exercised, either by one only of the Lords Justices and the Lord Chancellor, sitting together, or by both Lords Justices sitting apart from the Lord Chancellor, either in his absence or during the same time as he is sitting; and the Lord Chancellor may also, by himself, exercise all the jurisdiction, powers, and authorities he formerly had.¹ Since the creation of this Court, appeals are usually marked for rehearings before the Lords Justices: unless appointed to be heard before the Lord Chancellor or the full Court.²

An appeal lies from the decision of this Court to the House of Lords, in the cases in which the like decision of the Lord Chancellor would have been subject to appeal.³

The decision of the majority of the Judges of the Court of Appeal is taken and deemed to be the decision of the Court; and if the Judges of the Court are equally divided in opinion, the decree or order appealed from is taken and deemed to be affirmed.⁴

It appears that, when once a case has been decided by the Court of Appeal, however constituted, it will not be reheard before the same Court in another form; but, when no decision has been given, a rehearing before the the full Court may be obtained.⁵

In this Province, rehearings are before the full Court; and in certain cases an appeal lies to the "Court of Error and Appeal," established by ch. 13 of Con. Stat. of U. C.

If a party is dissatisfied with a decree or order, the proper course where it cannot be rectified in the manner already pointed out, is to rehear the cause. This he may do, whether the decree or order is made upon the hearing of the cause, or of a motion for decree, or of a demurrer or plea, or upon further consideration, or upon exceptions. A decretal order cannot, in fact, be discharged in any other manner; and where an attempt was made, by motion, to discharge

1 14 & 15 Vic. c. 2, s. 1. The Court of Appeal may call to its assistance, if necessary, one or more of the Common Law Judges: *ib.* s. 8.

2 *Seton*, 1168. The sittings of the Court of Appeal are regulated by the Lord Chancellor: see 14, 15. Vic. c. 28, s. 12.

3 *Ibid.*, s. 10.

4 *Ibid.*, s. 9.

5 *Blann v. Bell*, 2 De G. M. & G. 775, 788: 16 Jur. 1103, 1106. The Court has no jurisdiction to correct an error in an order of the Lord Chancellor's: *Attorney-General v. Mayor, &c., of Exeter*, 22 L. J. Ch. 418, L. JJ.

an order, pronounced by consent upon further directions, on the ground that the party had been surprised, Lord Thurlow refused to make the order upon motion: although he appeared to think, that where anything is inserted in a decretal order, as by consent, to which the party has not consented, there must be some way of rectifying it, namely, by bill of review; but that it cannot be done by motion.¹

The same rule, also, prevails where the order is made upon a petition:² in which case, the proper course is to rehear, in the same manner as upon a decree or decretal order.

Orders made upon motion are not proper subjects for a rehearing; but may be varied or discharged, upon application, by motion, either to the Judge who made the order, or to the Court of Appeal.

A rehearing ought never to be resorted to, where the defect, in the decree or order, is one which can be remedied by any of the methods before pointed out; and, as a general rule, it cannot be obtained till the decree or order has been passed and entered. Thus, in *Robinson v. Taylor*,³ the Court refused to allow a cause to be re-argued, upon a petition to alter the minutes; and the same rule was laid down, by Lord Eldon, in *Taylor v. Popham*,⁴ where an application was made, whilst the decree was in minutes, to rehear a cause heard by Lord Erskine.

A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree was pronounced. Where, therefore, the object, is not to correct the decree, but to remedy a grievance consequent upon it, resulting from circumstances *ex post facto*, and not making part of the case as it originally stood, a rehearing will not be permitted: in such a case, a new bill must be filed.⁵

Where the objection to a decree is upon matter of law apparent, or a mistake in law, to be collected from all the pleadings and evidence, the decree not being signed and enrolled, it is the subject of a

1 Anon. 1 Ves. J. 98.

2 *Bishop v. Willis*, 2 Ves. 8. 113.

3 1 Ves. J. 44.

4 15 Ves. 72; and see *Commissioners of Charitable Donations v. Hunter*, 1 Dr. & War. 544; see also *Re Risca Coal Company*, 8 Jur. N. S. 900: 10 W. R. 701, L. C.

5 *Bowyer v. Bright*, 13 Pri. 316; *Horne v. Barton*, 8 De G. M. & G. 587: 2 Jur. N. S. 1082.

rehearing; and there is no occasion for a bill in the nature of a bill of review; unless a supplemental bill is also necessary, to introduce new facts: in which case, the cause will come on to be heard upon the matter of that supplemental bill, together with the hearing of the original cause.¹

It will be observed that supplemental bills are still in use in England, but our Order 6 abolishes supplemental bills; original bills in the nature of supplemental bills; and bills of revivor and supplement; and Order 337 and subsequent orders provide a simple mode of securing the objects which are gained by the English mode of proceeding by bill. The English cases are, however, applicable so far as principles are concerned:—it is only in the mode of working out these principles that the difference occurs between the proceedings in England and those in this Province.

Our Order 322 provides that—"A rehearing may be had, as well after as before enrolment; but no second rehearing is to be had without leave of the Court granted upon special motion for the purpose."

This order alters our former and the present English practice, for by it there can be no rehearing of a decree or order of Court after it has been enrolled.

The Court seldom allows more than one rehearing, whether the second hearing was before the Judge who heard the cause originally, or before the Lord Chancellor or Lords Justices by way of appeal. It must not, however, be understood, that the power of the Court to direct a rehearing is limited to one only: the practice of doing so is only a general, not an inflexible rule;² and there are many cases in the books in which it has been departed from;³ and it seems that there is no positive restriction with regard to the number of rehearings; that the granting or refusing of a rehearing is in the discretion of the Court.⁴ This, however, is not the case, after a cause

¹ *Perry v. Phelps*, 17 Ves. 173, 178; *Head v. Godlee*, Johns. 536, 579.

² Per Lord Eldon, in *Waldo v. Caley*, 16 Ves. 214; see also *Gibb. For. Rom.* 183.

³ *Noel v. Robinson*, 1 Vern. 90, 94, n.; *Eyton v. Eyton*, 4 Bro. P. C. ed. Toml. 149; *Lady Faliland v. Lord Ceeney*, 5 ib. 478; *Hovel v. Hovel*, 1 Dick. 428; *Omerod v. Hardman*, 5 Ves. 722, 735; *Brown v. Higge*, 8 Ves. 561; 562; *East India Company v. Boddam*, 13 Ves. 421; *Macintosh v. Townsend*, 18 Ves. 330, 331; *Blackburn v. Jepson*, 2 V. & B. 359; *Deernurst v. Duke of St. Albans*, 2 B. & M. 702, 706; *Fuller v. Willis*, 11 Jur. 231, L. C.; *Laybery v. Brooking*, 7 De G.M. & G. 673; 2 Jur. N. S. 76.

⁴ *Mills v. Banks*, 3 F. Wms. 8.

has been already reheard before the appellate tribunal: in such a case, a second rehearing will not be permitted, unless leave has been previously granted by the appellate Judge, upon a special application for that purpose;¹ which may be made *ex parte*.² This rule applies, whether the decree upon the first rehearing had the effect of overruling, or of affirming the original decision; and is now so well recognised, that, in *Moss v. Baldock*,³ Lord Lyndhurst directed a petition of appeal to be taken off the file for irregularity because it had been presented without special leave, after one rehearing.

Order 324 provides that—"Re-hearings of causes are to be within six months after the decree, or decretal order has been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in Court, not being decretal orders, are to be within four months from the passing and entering of the same; or within such further time as the Court or a judge may allow upon special grounds therefor, shown to the satisfaction of the Court or judge."

In England, five years are allowed after the decree to bring the cause to a re-hearing, but the Court may, where it appears just and expedient, enlarge that period. Thus a re-hearing was permitted after the expiration of the five years, where a declaration which was prejudicial to the appellant, and unnecessary for the determination of the question in the cause had been inserted in the decree;⁴ and where there was a manifest error in the decree, and the fund was still in Court, the Court allowed a re-hearing, although thirty years had elapsed since the decree was pronounced.⁵ The application for leave was made *ex parte*.⁶ This Court will, by analogy to cases of appeal, in a proper case grant leave upon terms to re-hear a cause, though the usual time therefor has elapsed.⁷ Leave to re-hear was given when the time for re-hearing expired a few days before re-hearing term, and the delay had not really affected the progress of

¹ *Byfield v. Provis*, 3 M. & C. 457; *Deerkuret v. Duke of St. Albans*, 3 R. & M. 702.

² *Ex parte Bealey*, 3 McN. & G. 287, 298.

³ 1 Phil. 113.

⁴ *Walmesley v. Fozzall*, 1 De G. J. & S. 451.

⁵ *Brandon v. Brandon*, 7 De G. M. & G. 385; 2 Jur. N. S. 981; see also *Mills v. Banks*, 3 P. Wms. 1, 2; *Scarrisbrick v. Lord Skelmerdale*, 4 Y. & C. Ex. 78, 106; *Kelly v. Lennon*, 1 Jo. & Lat. 305, 333; *Gwynne v. Edwards*, 9 Beav. 22, 34; *Townley v. Beddell*, 15 Beav. 78; *Turner v. Turner*, 2 De G. M. & G. 23, 35; 15 Jur. 711.

⁶ *Brandon v. Brandon*, *ubi sup.*; and see *Storrs v. Benbow*, 1 W. R. 115, L. C. & L. JJ.

⁷ *Winters v. Kingston, F. B. Society*, 1 Cham. Rep. 214.

the cause, there having been no sittings to re-hear causes in the interval.¹

Order 325 provides that—"Where a decree or order is not passed and entered, within one month from the day judgment is pronounced, the time allowed for re-hearing the cause, or varying or discharging the order is to begin to run at the expiration of the month."

It will be observed that the English cases speak of a petition for re-hearing, but this is done away with in this Province; for order 326 provides that—"No petition for re-hearing is to be presented; but a party desiring to re-hear a cause is, after paying into Court a deposit of forty dollars, to set the cause down for re-hearing and serve notice thereof." And order 327 that—"Where a party seeks to vary part only of an order, he may, in the notice of re-hearing, state the part of the order which he seeks to vary."

A motion to rehear a cause after the time limited for rehearing has expired may be made *ex parte*.² A motion for leave to rehear, notwithstanding more than six months will have elapsed from the date of the decree before the then next rehearing term, was granted where it appeared that judgment had been given but a short time previous to the last rehearing term.³ A vacancy occurring on the Bench was deemed a sufficient reason for not rehearing at the first rehearing term after the decree drawn up; and the time was, on application, extended.⁴ Where it was shown that a decree, not enrolled, which had been pronounced in 1855, was clearly erroneous, an order was made for rehearing the cause notwithstanding the lapse of time.⁵

A rehearing may be obtained, after the decree has been carried into execution; and we have seen that after the trial of an issue, the Court has permitted a petition, for a rehearing of the order directing an issue, to come on for hearing, at the same time as a motion for a new trial of the issue.⁶ So, also, where the Court, by

1 *Stevenson v. Nichol*, 2 Cham. Rep. 188.

2 *Dickson v. Burnham*, 2 Cham. Rep. 426.

3 *Fleming v. Dunoon*, 3 Cham. Rep. 53.

4 *Romanes v. Fraser*, 3 Cham. Rep. 53.

5 *Cameron v. Wolf Island Canal Company*, 3 Cham. Rep. 54.

6 *White v. Lisle*, 3 Swanst. 342, 351; *Bullin v. Masters*, 2 Phill. 290; *Parker v. Morrell*, *ib.* 458.

decree, directed the bill to be retained, with liberty to the plaintiff to bring an action, which he did, and failed, the Court permitted the cause to be reheard : although it was objected, that the plaintiff having acted under the decree himself, by bringing the action, could not be heard to dispute the propriety of it.¹ But where a decree directs inquiries, the Court will not be disposed to reverse it, after the inquiries have been made.

Order 328 provides that—" A defendant waiving all objections to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court directs, may have the cause reheard upon the merits stated in the bill."

After a cause had been heard and reheard before Jameson, V.C., and again re-heard before this Court, a third re-hearing was ordered under the peculiar circumstances. Only one rehearing will be permitted, as of course.² Where a decree is sought to be changed from a sale to a foreclosure, the cause must be set down to be reheard, and notice served on the defendant, and that, too, although the bill has been taken *pro confesso*.³ Where a cause is reheard by some of several defendants, and the Court affirms the decree as against them the other defendants who did not rehear cannot obtain any relief although they appear at the rehearing and ask it.⁴ The deposit on was divided under special circumstances.⁵ Rehearings or applications to discharge orders made in Chambers must be set down for a day, which falls within the periods prescribed by the Orders of 9th May, 1862, and 20th Feb., 1865, and it is not sufficient that the case should be set down, and the notice thereof served within such periods.⁶ In a suit for the administration of a debtor's estate, under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause : and this is the proper course where the alterations is such as might be effected in that way by a party to the cause.⁷ After carrying the decree into the Master's office the plaintiff was proceeding to take the accounts directed thereby. (See 6 Grant, 600). The defendant pre-

¹ *Brophy v. Holmes*, 2 Moll. 1.

² *Cook v. Walsh*, 2 Grant, 625.

⁴ *Black v. Black*, 9 Grant, 408.

⁵ *The G. W. Railway v. Desjardins Canal Co.*, 9 Grant, 523.

⁶ *Re D. G. Miller*, 12 Grant, 73.

⁷ *Mulholland v. Hamilton*, 12 Grant, 413.

³ *McLellan v. Jacobs*, 9 Grant, 50.

sented a petition of re hearing which was ordered, and the cause set down in the usual manner; whereupon a motion was made to stay further proceedings in the Master's office until after the cause had been re heard. Spragge, V.C., refused to stay the taking of the account, but intimated that no report need be signed, the defendant using due diligence to have the cause re heard.¹ A decree was pronounced setting aside a conveyance, and the defendant being dissatisfied therewith, obtained a re hearing of the cause. Upon the re hearing, the decree originally pronounced was affirmed with costs and a further direction made that the defendant should execute a conveyance to the plaintiff.² A party is entitled to have a cause re-heard before this Court, which has already been heard and re heard by the Vice-Chancellor alone. But only one rehearing will be permitted, as of course.³ Where a decree of foreclosure against an infant defendant did not reserve a day after his attaining 21 to show cause and upon his attaining his majority the defendant applied upon affidavits to put in a new answer, and raise a fresh defence. *Held*, (Blake, C., *absente*), that the relief could not be obtained without a rehearing of the cause, and the motion was therefore refused with costs.⁴ Upon the rehearing of a cause, where a decree for foreclosure did not reserve a day to the infant: *Held*, (Blake, C., *dissentiente*), that in decrees of foreclosure against infant defendants, a day to show cause after obtaining twenty-one must be reserved to the defendants.⁵

Order 323 provides that, "Rehearings of causes, and applications in the nature of rehearings to discharge or vary orders made in Court, or in Chambers by a judge, are to be in rehearing term only unless some special day be appointed by the judges for the purpose."

And Order 413, that "There are to be three rehearing terms in each year, commencing respectively as follows :

- " I. The third Thursday in February ;
- " II. The last Thursday in August ;
- " III. The first Thursday in December.

1 *Campbell v. Campbell*, 1 Cham. Rep. 80.

3 *Cook v. Walsh*, 1 Grant, 208.

5 *Ibid.* Affirmed on appeal 26 February, 1852.

2 *Harkin v. Rabidon*, 7 Grant, 248.

4 *Mair v. Kerr*, 3 Grant, 223.

Where an appeal is dismissed without costs, the deposit will be returned, unless the Court makes a special order to the contrary.¹

An appeal may be allowed *in forma pauperis*,² and without making any deposit.³

A married woman appealing *in forma pauperis* prosecutes the appeal, without a next friend.⁴ A married woman allowed to defend an appeal *in forma pauperis*, on its dismissal obtained *divers* costs.⁵

An infant may also, it seems, appeal *in forma pauperis*; but a next friend is required.⁶

Where the appeal is against the whole decree, the cause is, in ordinary cases, actually reheard: that is, the case is stated, and the cause proceeded with, exactly as if it were an original hearing. The general rule is, that the appellant is entitled to begin.⁷ The only exception is, where a defendant appeals from the whole of an original decree: the reason being, that, in such a case, the plaintiff may adduce new evidence, and shape his case differently.⁸ It is, however, in the discretion of the Court to vary these rules.⁹ An appeal from the whole decree except as to costs, is, for this purpose, treated as an appeal from the whole decree.¹⁰

All parties interested in supporting the decree or order appealed from are entitled to be heard;¹¹ but no party, except the appellant, can be heard in support of the appeal. If, therefore, any party, who is not included as a co-petitioner in a petition of rehearing, is desirous of appealing, he must present a separate petition: otherwise, he will be precluded from all benefit of the appeal, even though the result of it should be to show that the decree was com-

1 *Dell v. Barlow*, 2 R. & M. 686; *Rattenbury v. Fenton*, C. P. Coop. t. Brough, 60, 64. Where the appeal is compromised, the deposit will be returned on a petition of course by the appellant, with the respondent's consent subscribed thereto.

2 *Bland v. Lamb*, 2 J. & W. 402.

3 *Bradberry v. Brooke*, 4 W. R. 699, L.JJ.

4 *Crouch v. Walker*, 4 De G. & J. 43; 5 Jur. N. S. 326.

5 *Wellesley v. Wellesley*, 1 De G. M. & G. 501.

6 See *Lindsay v. Tyrrell*, 2 De G. & J. 7; 24 Beav. 124; 3 Jur. N. S. 1014.

7 *Bell v. Lord Mezborough*, 1 C. P. Coop. t. Cott. 246.

8 *Roberts v. Marchant*, 1 Phil. 370; *Lees v. Nuttall*, 2 M. & K. 819; *Seton*, 1155. On an appeal from the whole of an order made on motion for decree, the plaintiff begins: *Trustees of Birkenhead Docks v. Laird*, 4 De G. M. & G. 732. On an appeal from an order on further consideration, the appellant's counsel begins: *Freer v. Hesse*, *ib.* 495, 500; *Clarke v. Bridge*, 6 Jur. N. S. 386, L. J. J.

9 *Alexander v. The Duke of Wellington*, 2 R. & M. 35, 52.

10 *Onslow v. Wallis*, 13 Jur. 1085, 1086, L. C.; *Senhouse v. Hall*, 2 Eq. & Rep. 493; 2 W. R. 297, L. J. J.; *contra*, *Granger v. Stingsby*, 8 De G. M. & G. 335.

11 *Allday v. Fletcher*, 8 Jur. N. S. 422, L. C.

pletely wrong, as well against him as against the appellant. Thus, where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants, who did not join in the appeal, it was held, that such other defendants could have no benefit of the order, although it might prevent the prosecution of the decree.¹ It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed, or the decree only slightly varied, the defendants who did not appeal would, if they had been heard in support of the decree, have been entitled to their costs : either to have them paid directly by the defendant who appealed, or by the plaintiff ; such costs to be added to the plaintiff's own costs, and reimbursed to him by the appellant.²

Upon a rehearing, it is not, in general, competent to either party to enter into any new evidence ;³ but evidence taken before the original hearing, though not made use of, may be read ;⁴ and documents which were not in evidence at the original hearing have been permitted to be read on an appeal ;⁵ but for this purpose an order to prove them as exhibits at the hearing of the appeal must be obtained. Such an order may be obtained *ex parte*.⁶ No evidence will be received as to matters which have occurred since the original hearing.⁷

The plaintiff, by reading on the original hearing part of the answer as an admission, does not make it evidence upon the appeal.⁸

Where the plaintiffs had, through the inadvertence of counsel, omitted to prove a will of real estate, in consequence of which the bill was dismissed at the original hearing, they were allowed to prove the will at the rehearing, which was postponed on the terms of their paying the costs of the application, and the costs of the day on the original hearing : in that case, however, the will was not dis-

1 *Tasker v. Small*, 6 P. Coop. 255.

2 *Stocken v. Stocken*, and *Stubbs v. Sargon*, cited *ib.* 257. As to other defendants appearing voluntarily on an appeal, see *Attorney-General v. Gibbs*, 2 Phil. 327.

3 *Addison v. Hindmarsh*, 1 Vern. 442 ; *Whitworth v. Whyddon*, 2 McN. & G. 56 : 14 Jur. 142.

4 *Cunyngham v. Cunyngham*, Amb. 90 ; *Goodyer v. Lake*, *ib.* ed. Blunt, n. 4 ; *White v. Fussell*, 1 V. & B. 153 ; *Hedges v. Cardonnel*, 2 Atk. 408 ; *Williams v. Goodchild*, 2 Russ. 91 ; *Saton*, 1155.

5 *Williams v. Goodchild*, 2 Russ. 91 ; and see *Glover v. Daubeney*, 9 Jur. N. S. 90, L. J. J., as to receiving new affidavits from persons who have already given evidence.

6 *Walker v. Symonds*, 1 Mer. 37, n. ; 2 Y. & C. Ex. 478, n. ; *Higgins v. Mills*, 5 Russ. 287 ; *Lowell v. Hicks*, 2 Y. & C. Ex. 472, 478 ; *Herring v. Cloberry*, C. & P. 251 ; *Cotton v. Corby*, 1 Cham. Rep. 10.

7 *Lambe v. Orton*, 33 L. J. Ch. 81, V. C. K.

8 *Alfrey v. Alfrey*, 1 McN. & G. 87, 98 : 13 Jur. 269, 270.

puted in the cause, and the omission arose wholly from the inadvertence of counsel;¹ and in other cases, new evidence has been allowed to be read *de bene esse*.²

It seems, that if, after the hearing, a witness has been convicted of perjury, the circumstances may be brought before the Court upon a rehearing. So also, where a witness in an answer to a bill exhibited against him since the original hearing, had confessed, that, on the day he was examined, he took a bond from the plaintiff, whereby the plaintiff bound himself, that, if he recovered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the rehearing to take off the effect of the witness's evidence.³

The Court of Appeal may, if it thinks fit, on a rehearing or appeal, examine a party or a witness orally, although he was not examined in the Court below.⁴

An application by motion or petition, whatever is its object which has failed in the Court below, may be renewed before the Court of appeal upon fresh evidence; when, if it is successful, the party moving or petitioning, nevertheless, commonly has to pay the costs of his first attempt; the circumstance that fresh evidence is brought forward sufficiently showing that the application had been made upon a defective case.⁵ But if the application is to discharge an order as not being justified by the evidence which has been used in the Court below, the Court of Appeal looks at that evidence only which is recited in the order as having been read; and if the application is successful, the party moving or petitioning commonly gets the costs of the motion or petition in the Court below.⁶

Upon a rehearing or appeal, the whole case is open to the respondent: so that, if the appeal is against the whole decree, it is competent to the Court to modify the decree, by making it more favourable to the respondent.⁷ Thus, where a plaintiff who had

¹ *Hood v. Pinn*, 4 Sim. 101.

² *Dashwood v. Lord Bulkely*, 10 Ves. 230, 236; *Buckmaster v. Harrop*, 13 Ves. 456, 458; *Dawson v. Prince*, 2 De G. & J. 41, 43; 4 Jur. N. S. 497.

³ *Needham v. Smith*, 2 Vern. 463.

⁴ 15 & 16 Vic. c. 36, s. 39; and see *Martin v. Pycroft*, 2 De G. M. & G. 785, 797; 16 Jur. 1125; *Hope v. Threlfall*, 2 Eq. Rep. 307, L. JJ.; *Hindson v. Wetherill*, 18 Jur. 490, L. JJ.

⁵ Upon this point, see *Williams v. Goodchild*, 2 Russ. 91.

⁶ *Tanner v. Carter*, 1 C. P. Coop. t. Coot, 337; see also *Whitworth v. Whyddon*, 2 McN. & G. 56; 14 Jur. 142; *Pole v. Joel*, 2 De G. & J. 285; *Re Dixon*, 3 Jur. N. S. 29, L. JJ.

⁷ *Sullivan v. Jacob*, 1 Moll. 472; *Smith v. Evingham*, 1 C. P. Coop. t. Coot. 61, n. (b); *Seton*, 1156.

succeeded in obtaining a decision against the defendant, with costs, not being satisfied with the view which a Vice-Chancellor had taken of the case, had the cause reheard before Lord Cottenham, in order to obtain an alteration in the decree more favourable to himself: his Lordship, upon the rehearing, being of opinion that the plaintiff was not entitled to any relief at all, dismissed his bill with costs. In his judgment, his Lordship said: "The plaintiff having thought fit to present a petition of rehearing against the whole decree, the defendants are entitled to raise any question (and amongst others the question of costs,) which properly arose out of the subject matter of the appeal; and I am bound to deal with the cause as if it now came on before me upon the original hearing. Supposing that to be so, I should certainly, in dismissing the bill, give the defendants their costs; and it is only upon those terms that the plaintiff can be entitled to get rid of the decree which he has impeached by his present appeal. The result is, the defendants must have their costs of the suit up to and inclusive of the hearings; but I cannot give them their costs of setting the decree right."¹

So, where the appeal is against part of the decree only, the respondent may, if he considers it necessary, go into the whole case: whilst the appellant can only go into the parts complained of in his petition. Therefore, where there were two questions in the cause, one being whether the executor was entitled to the surplus, and the other whether a legacy given to him by the will was in satisfaction of a debt due to him by the testator, and, upon the first point, the Court decided against him, because he had put in an answer in which he admitted himself accountable for the surplus but the second point was determined in his favour, whereupon the plaintiff appealed against the last decree, Lord Cowper held, that it was competent to the defendant to go into the first point: though he eventually did not decide it in his favour.²

But as between the respondent and the parties other than the appellant, only the point appealed from is open to the respondent³

¹ *Oldham v. Stonehouse*, 3 M. & C. 317.

² *Rawlins v. Powell*, 1 P. Wms. 397, 300; *Watts v. Symes*, 1 De G. M. & G. 240, 242; *Sherwin v. Shakespeare*, 5 De G. M. & G. 517, 523.

³ *Lord Brooke v. Earl of Warwick*, 18 Jur. 547, L. C.; *Tasker v. Small*, 1 C. P. Coop. t. Cott. 61, n. (b); *Seton*, 1155.

Therefore, where there is an appeal against a part of a decree, and the respondent or some other party feels himself aggrieved by another part, the proper course is to present a cross appeal. Where that is done, the last appeal may be brought on to be heard at the same time with the first, and one order be made in both.¹ If the respondent chooses, when the appeal is from part of the decree only, to go into the whole case, the whole case is then open to the appellant.²

At the hearing of an appeal or rehearing, the Court may give the plaintiff leave to amend, by adding parties, in the same manner as upon an original hearing, and may order the rehearing to stand over for the purpose; and it has gone to the extent of allowing the plaintiff to add the Attorney-General as a party: either by converting the bill into an information and bill, or into an information only.³

The costs of a rehearing, as well as of an original hearing, are in the discretion of the Court; but, generally, if an appeal is dismissed, it will be with costs;⁴ and the Court will not take into consideration the fact that, in affirming the decision of the Court below, the Court of Appeal had proceeded upon entirely different grounds.⁵ Where the Lords Justices differ, the appeal is usually dismissed without costs.⁶

From a certificate furnished to Lord Langdale, M. R., by the Taxing Masters, in the case of *Agabeg v. Hartwell*,⁷ it appears, that as a general rule, costs of appeals, rehearings, and exceptions, are not carried by the words "costs of suit as between solicitor and client;" but require to be speedily mentioned in the order for taxation.

When evidence is used on a rehearing, which was not used upon the former hearing, it is a circumstance which is taken into consideration in disposing of the costs.⁸

¹ *Blackburn v. Jenson*, 2 V. & B. 359.

² *Anon*, 1 C. P. Coop. t. Cott. 61, n. (b).

³ *President of St. Mary Magdalen v. Sibthorp*, 1 Russ. 154.

⁴ *McCaumont v. Rankin*, 2 D. G. M. & G. 403, 426; *Borton v. Dunbar*, 9 W. R. 41, L. C.

⁵ *Cradock v. Piper*, 1 M. & G. 684; see *contra*, *Oriental Steam Company v. Briggs*, 8 Jur. N. S. 201, 204; 10 W. R. 125, L. C. As to the costs, generally, of rehearings and appeals, see *Morgan & Davey*, 96-104.

⁶ *King v. King*, 1 De G. & J. 663, 674; 4 Jur. N. S. 721.

⁷ 5 Beav. 271, 273.

⁸ *Williams v. Goodchild*, 2 Russ. 91; *Tanner v. Carter*, 1 C. P. Coop. t. Cott. 337; *Martin v. Pycroft*, 2 De G. M. & G. 785, 806; 16 Jur. 1125.

It was formerly the practice, in no case to order a respondent to pay costs; but according to the modern practice, there is no rule against giving a successful appellant all his costs;¹ and a respondent has frequently been ordered to pay costs.²

In *Phelps v. Prothero*,³ where the decree was made more beneficial to the respondents than the one appealed from, their costs were made costs in the cause, instead of being ordered to be paid by the appellant. And where new issues were directed on the appeal, the costs were reserved.⁴

In *Oldham v. Stonehouse*,⁵ where a plaintiff appealed from a decree which had been pronounced in his favour with costs, and, upon the rehearing, the respondent satisfied the Court that he was entitled to no decree at all, Lord Cottenham, as we have seen, reversed the decree, and dismissed the bill: giving the defendants the costs up to, and of the hearing; but he refused to give them the costs of setting the decree right.

Where an appeal, which is dismissed, has been recommended by the Court below, no costs are usually given.⁶

Where the decree omitted to provide for the costs of an appeal motion which had been reserved till the hearing of the cause, an order was made, on petition, for payment thereof, notwithstanding the decree had been enrolled.⁷

Where a decree is varied by the Court of Appeal, subsequent proceedings belong, nevertheless, to the Court below, as if the order made on appeal, had been made by that Court.⁸ The Court of Appeal, however, sometimes, by the order on the appeal, directs that the further consideration be had before that Court.⁹

¹ *Collins v. Burton*, 4 De G. & J. 612, 619; 5 Jur. N. S. 1113, 1114; and see *Morgan & Davey*, 101.

² *Powell v. Lovegrove*, 8 De G. M. & G. 357; 2 Jur. N. S. 791; *Pooley v. Quiller*, 2 De G. & J. 327;

4 Jur. N. S. 845; *Laloe v. Leigh*, 3 De G. & J. 204, *Re Skiggs, Marriage v. Skiggs*, 4 De G. & J.

4, 9; 5 Jur. N. S. 325; *Collins v. Burton*, 4 De G. & J. 612, 619; 5 Jur. N. S. 1113; *Ralli v.*

Universal Marine Insurance Company, 2 J. & H. 176; 8 Jur. N. S. 495, 497, L.J.J.; *Baring v.*

Harris, 10 Jur. N. S. 1190; 13 W. R. 210, L. C.

³ 12 Jur. 783, V. C. K. B.

⁴ *Parker v. Morrell*, 2 Phil. 453, 468.

⁵ 8 M. & C. 317.

⁶ *Re Colquhoun*, 5 De G. M. & G. 85.

⁷ *Viney v. Chaplin*, 3 De G. & J. 282; S. C. 7 W. R. 159, where the form of order is given; and see *Morgan & Davey*, 34.

⁸ *Sewdon v. Marriott*, 2 Phil. 623; S. C. *nom Flight v. Marriott*, 12 Jur. 487, L. C.; *Salkeld v. Johnston*, 1 McN. & G. 242, 256; *Malcolm v. Scott*, 3 McN. & G. 29, 45.

⁹ See *Seton*, 1152.

Appeals to the Court of Error and Appeal.

The cases in which an appeal lies from the Court of Chancery to this Court, and its constitution and powers, are set forth in the Act by which it was created (Con. Stat. U. C. ch. 18)—to which the practitioner is referred.

The practice of the Court is regulated by the Orders in the Court of Error and Appeal of 8th September, 1871.

CHAPTER XXXV.

REVIVOR AND SUPPLEMENT.

It frequently happens, that a suit in Chancery, though perfect in its institution, becomes defective by the death or marriage, or by some change or transmission of the interest or liability, of some of the parties.¹ In such case, the suit is said to have abated, or become defective; and, as a general rule, no proceeding whatever can be taken in it, until an order to revive the suit or carry on the proceedings, has been made.

This order may, in most cases be obtained upon an allegation or the death or marriage, or of the facts by which the change or transmission of interest or liability has taken place.

Our orders on the subject are taken from the Imperial Statute 15 & 16 Vic., ch. 86, sec. 52, and the order of revivor made under them is usually called "the common order."

Order 337 provides that—"Upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, on the part of a plaintiff or defendant by devise, bequest, descent, or otherwise, it shall not be necessary to exhibit a bill of revivor or supplemental bill, to obtain an order to revive such suit, or an order to carry on the proceedings, but an order to the effect of the order to revive, or of the usual supplemental decree under the former practice of the Court may be obtained upon præcipe, upon an allegation contained in the præcipe, of the abatement of the suit, or of the same having become defective, and of the change or transmission of interest or liability."

¹ A defect of this nature cannot be remedied by amendment, or supplemental statement: *Commerell v. Hall*, 2 Drew. 104; S. C. *non* *Commerell v. Bell*, 18 Jur. 141; *Williams v. Jackson*, 5 Jur. N. 264; 7 W. R. 104, V. C. W. *Webb v. Wardle*, 11 Jur. N. S. 278, V. C. K.

And Order 338, that "an office copy of the order is to be served upon the party or parties who would be defendant or defendants to a bill of revivor or supplemental bill according to the former practice of the Court, and such order shall, from the time of service, be binding upon such party or parties, in the same manner in every respect as if the order had been regularly obtained according to the former practice of the Court, and the party or parties shall thereupon become thenceforth a party or parties to the suit."

The order may be obtained from the Deputy Registrar of the County where the bill is filed, under Orders 85 and 87.

Where the plaintiff in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives, it was held that before an application to revive could be made, the decree must be drawn up, and a guardian *ad litem* appointed.¹

No evidence is required of the alleged facts; but the order is made on the statement in the præcipe.² If the statement is not substantially true, the order may be discharged with costs,³ on a special application. In a proper case, the order will be made, with liberty to the new defendant to put in an answer.⁴

Where the suit abates by the change or transmission of the interest or liability of a defendant, the order of revivor need only be served upon the persons who have become necessary parties to the suit, by reason of such change or transmission; but where the suit abates by a change or transmission of the interest or liability of the plaintiff, or one of several co-plaintiffs, all the other parties to the suit must be served.⁵ If, after a decree, a suit is revived by a defendant, all parties must be served with the order of revivor.⁶

¹ *Beamise v. Pomeroy*, 1 Cham. Rep. 32.

² *Martin v. Hadlow*, 9 Hare, App. 52; *Gordon v. Jesson*, 16 Beav. 440.

³ *Brignall v. Whitehead*, 30 Beav. 229; 8 Jur. N. S. 183.

⁴ *Lash v. Miller*, 4 De G. M. & G. 841; 1 Jur. N. S. 457; *Kitchin v. Himble*, 8 Jur. N. S. 588; 10 W. R. 686; V. C. W.; *Martin v. Purnell*, 3 W. R. 395, L.J.J.

⁵ Order 338. The provision is, that the order is to be served upon the persons who, according to the then practice, would be defendants to a bill of revivor, or supplemental bill. From this, the statement in the text follows: see *Fallowes v. Williamson*, 11 Ves. 306; *Cave v. Cork*, 2 Y. & O. C. C. 130; 7 Jur. 461; *Signall v. Atkins*, 6 Madd. 369; *Dyson v. Morris*, 1 Hare, 413; *Jones v. Howells*, 3 Hare, 342; *Feary v. Stephenson*, 1 Beav. 42; *Pinkus v. Peters* 5 Beav. 268; *Parker v. Parker*, 9 Beav. 144; *Jones v. Powell*, 11 Beav. 598; *Lyns v. Pennell*, 1 Sim. N. S. 113; and see *Ld. Rd.* 35, 75.

⁶ *Buchanan v. Malins*, 11 Beav. 52.

Order 341 provides that "upon every office copy of an order of revivor served, there is to be endorsed a memorandum in the form or to the effect set forth in Schedule N." And Order 342 that "where an order to revive is served out of Ontario, the party served is to have the same time to apply to discharge the order, as a defendant has to answer a bill of complaint; but an application may be made for shortening the time, as in the case of answers to bills in like cases."

The Court will, however, upon a proper case being shewn, order substitutional service to be made.¹ And Order 343 provides that "where the Court authorizes publication instead of service, the Court is at the same time to appoint such time for applying to discharge the order to revive as seems proper."

Where the order has to be served on former parties, who have already appeared by a solicitor, service upon such solicitor is sufficient.²

The order becomes binding from the time of service on the parties, unless they apply to the Court to discharge it. Order 339 provides that "it shall be open to the party or parties so served, to apply to the Court, within fourteen days after the service of the order, by motion or petition, to discharge the order on any ground which would have been open to him or them on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon." And Order 340 that "if a party so served shall be under any disability other than coverture, the order shall be of no force or effect as against such party, until a guardian *ad litem* has been duly appointed for such party, and the period of fourteen days has elapsed thereafter."

It may here be mentioned that Order 408 provides that the time of vacation is not to be reckoned in the computation of the times appointed or allowed for moving to discharge an order of revivor.

¹ *Forster v. Menzies*, 16 Beav. 568, 17 Jur. 657; S. C. 10 Hare, App. 36, n; *ib.* 71, n; see also *Hart v. Tulk*, 6 Hare, 618; *Scott v. Wheeler*, 13 Beav. 239.

² *Harr. by Newl.* 71; *Forster v. Menzies*, shows that the order must be served personally, when the parties are new: but it appears that where it is to be served on persons already parties to the suit, who have appeared by solicitor, service on the solicitor will be sufficient.

Some alteration in the title of the cause invariably follows upon obtaining the order. If the order has been made on the application of all the original plaintiffs, a second title is not necessary, but the names of the new defendants, and the words "made parties by order of revivor," or "supplemental order," as the case may be, must be added to the title, before the word "defendants." If the order has been obtained by some only of the original plaintiffs, or by a defendant, or some other person, a second title must be added, in which the persons on whose application the order has been made are named as plaintiffs, and the persons against whom the order is made are named as defendants; and after the second title, the words "by order of revivor," or "by supplemental order," as the case may be, must be added.¹

Where an abatement of a suit takes place before decree, by the death of a sole plaintiff, the representative, real or personal, as the case may be, of such plaintiff, is the only person entitled to revive: unless the bill was originally filed by the plaintiff in a representative capacity, namely, as executor or administrator of a person deceased: in which case, the suit can only be revived by the person in whom the representation of the deceased person is vested, and not the representative of the original plaintiff, except where such representative is also clothed with the character of representative of the original testator or intestate.²

If the abatement has occurred in consequence of the death of one of several plaintiffs, the suit may be revived by the representative of the deceased plaintiff, either in conjunction with, or separately from, the surviving plaintiffs: who, however, if they refuse to concur in the application, must be served with the order.³ It seems also, that, where one of several plaintiffs dies, unless the interest of the deceased plaintiff survives to the other, the suit becomes wholly abated: so that is necessary to serve all the parties to the original suit, with the order of revivor;⁴ but one of the surviving plaintiffs may, if the other surviving plaintiffs refuse to

¹ *Braithwaite's Pr.* 560.

² *Huggins v. York Buildings Company*, 2 Eq. Ca. Ab. 3, pl. 14; *Stuart v. Burrowes*, Drury, 265; *O'Brien v. Mahon*, 2 Jo. & Lat. 201. If in a case of this nature, a suit has been revived by a wrong party, the proper course to be pursued by the right party is to revive *de novo*: *ib.*; and see *Rylands v. Latouche*, 2 Bligh, 566.

³ *Fallowes v. Williamson*, 11 Ves. 309; and see *Pannell v. Hurley*, 2 Coll. 241.

⁴ *Cave v. Cork*, 2 Y. & C. C. C. 130; 7 Jur. 461.

join, obtain an order of revivor alone: serving the other surviving plaintiffs, as well as the representatives of the deceased plaintiffs, with the order.¹

In the case of a bill by a corporation sole, the death of the plaintiff occasions an abatement; but a material distinction arises with respect to the person entitled to revive or continue the suit. If the plaintiff was entitled to the subject-matter for his own benefit, the suit may be revived by his personal representatives; but if the plaintiff was only entitled in his corporate capacity, for the benefit of himself and successors, the suit can only be continued by his successor.

When the abatement is occasioned by the marriage of a female plaintiff, the suit may be revived by the husband and wife jointly; or, if the property in litigation be the wife's separate property, the order of revivor must be obtained on the part of the wife, by her next friend.²

Where the abatement has occurred before decree, the suit can only be revived by the plaintiff, or those claiming under him. In certain circumstances, however, a defendant, though he cannot revive the suit, may obtain an order that the plaintiff or his representatives may revive within a limited time, or that the bill may be dismissed.³

Although a defendant cannot revive the suit before decree, he, or those claiming under him, may do so after decree, if the plaintiffs, or those standing in their right, neglect to do it: for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have equally a right to prosecute it.⁴

A defendant who wishes to revive a suit after decree should, it seems, give notice of his intention to do so to the plaintiff or his representatives.⁵ It does not appear, however, that the necessary

¹ *Finch v. Winceilsea*, 1 Eq. Ch. Ab. 2, pl. 7.

² *Trezevant v. Broughton*, 5 W. R. 517, M. R.; *Seton*, 1165; *Powell v. Heather*, 1 L. T. N. S. 479.

³ *Ante*.

⁴ *Id.* Rd. 79; *Kent v. Kent*, Prec. in Ch. 197; *Anon.*, 3 Atk. 691; *Lord Stowell v. Cole*, 2 Vern. 219; *Lady Stowell v. Cole*, *ib.* 296; *Williams v. Cooke*, 10 Ves. 406; *Devaynes v. Morris*, 1 M. & C. 213.

⁵ *Noble v. Stow*, (No. 2), 30 Beav. 612; 8 Jur. N. S. 147; see, however, *Lys v. Lee*, 4 De G. M. & G. 219; 17 Jur. 607; 10 Hare, App. 72; 17 Jur. 272.

effect of a revivor, by a defendant, is to take from the plaintiff the conduct of the cause.

Where, in a creditor's suit, the plaintiff dies after decree, any creditor, who has proved his debt, may revive the suit; but he should first give notice to the plaintiff's representatives, if any.¹ And a similar order has been made, where the plaintiff became bankrupt.²

It may be mentioned here, that a new party, representing the interest of the former party, who is brought before the Court by order of revivor, stands exactly in the same plight and condition as the former party; is bound by his acts; and may be subject to all the costs of the proceedings, from the beginning of the suit.³

Where the suit abates or becomes defective, either before or after the decree, by the birth of a child, who is a necessary party, the common order to revive and carry on the proceedings may be obtained.⁴

The common order to revive and carry on the proceedings may also be obtained: when the suit abates, or becomes defective, by the bankruptcy of a plaintiff,⁵ or defendant;⁶ where a new assignee had been appointed;⁷ where a sole plaintiff has been found luna-

1 *Dixon v. Wyatt*, 4 Madd. 392; *Cook v. Bolton*, 5 Russ. 282; *Brown v. Lake*, 2 Coll. 620; *William v. Chard*, 5 De G. & S. 9, 14; *Johnston v. Hammersley*, 24 Beav. 498; *Lowes v. Lowes*, 3 De G. M. & G. 784; *Inchley v. Alsopp*, 9 W. R. 649, M. R.; *Bell v. Bell*, 12 W. R. 230, V. C. S.

2 *English v. Hayman*, 9 Hare, App. 88.

3 L.I. Rd. 88; *Whitcomb v. Minchin*, 5 Madd. 91; *Anon.*, 1 Atk. 89; but see *Foxwell v. Grotorez*, 33 Beav. 345, where the assignee of a bankrupt, who improperly continued the defence to a suit, was held only liable to pay the costs subsequent to the bankruptcy.

4 *Fullerton v. Martin*, 1 Drew. 238; *Phippen v. Brown*, 1 Jur. N. S. 698, V. C. W.; *Jebb v. Tugwell*, 20 Beav. 461; *Pickford v. Brown*, 1 K. & J. 643. For form of order, see *Seton*, 1166, No. 9; but see *Garrett v. Lancefield*, 11 W. R. 869, V. G. K.; see also *Leyland v. Leyland*, 10 W. R. 149, V. C. K. An inquiry, whether the proceedings were beneficial to the infant, is not necessary: *Nottley v. Pabner*, 1 Jur. N. S. 221; 3 W. R. 201, V. C. K.; *Barrett v. White*, ib. 536, V. C. K.; though such an inquiry may be directed: *Brookfield v. Bradley*, *Seton*, 1170. If any step has been taken after the abatement, the Court, on being satisfied that is beneficial for the infant, may, on making the order for service, direct the infant to be bound: *Jebb v. Tugwell*, *ubi sup.*; see also *Freeman v. Whitbread*, 12 W. R. 619, V. C. K.

5 *Jackson v. Riga Railway Company*, 28 Beav. 75; 6 Jur. N. S. 386; *Macdonald v. Macfarlane*, 6 W. R. 245, V. C. W.; and see *Mostyn v. Emmanuel*, 5 N. R. 464, V. C. W.; but see *Maw v. Pearson*, 12 W. R. 701, M.R., where the Court refused to make the order at the instance of a defendant after decree, though the assignees declined to proceed.

6 *Lash v. Müller*, 4 De G. M. & G. 841; 1 Jur. N. S. 457; *Cochrane v. Phillips*, 3 W. R. 461, V.C.S.; *Cross v. Thomas*, 16 Beav. 592; 17 Jur. 336; *Kitchen v. Limble*, 8 Jur. N. S. 588; 10 W. R. 686, V.C.W.; *Joborne v. Couch*, *Seton*, 1166; and see ib. 1170. For form of order, see *Seton*, 1165, No. 5. When the assignees have been brought before the Court, the bankrupt should not be served with any further proceedings in the cause: *Robertson v. Southgate*, 5 Hare, 233; *Stahlschmidt v. Lett*, 5 Hare, 595.

7 *Gordon v. Jason*, 16 Beav. 440. For form of order, see *Seton*, 1165, No. 6.

tic;¹ where a defendant has become lunatic;² and where a new committee of a lunatic defendant has been appointed.³

A similar order may also be obtained against the trustees of a settlement of the interest of a female plaintiff,⁴ or defendant;⁵ and, generally, in the case of an assignment *pendente lite*.⁶

The common order to revive may also be obtained where the suit relates to real estate, and the abatement is occasioned by the death of a sole plaintiff, who has devised his interest;⁷ though the Court at first held otherwise;⁸ and where the abatement or change of interest requires that the frame of the suit, with respect to parties, should be altered.⁹ The Court, however, refused to make the common order, against the curator of one of several plaintiffs, who had been convicted, in a foreign court, of felony: although the curator, according to the Law of the foreign country, fully represented him.¹⁰

Where a sole plaintiff in a foreclosure suit dies after decree, his devisee is entitled, on *præcipe*, to the common order to revive.¹¹ Where a defendant becomes insolvent after the service of the bill upon him, but before the time for answering has expired, and the suit is thereupon revived against the assignee in insolvency, it is necessary to serve the assignee with the bill as well as with the order to revive or an order *pro confesso* cannot be obtained.¹² Persons who acquired an interest in the subject of the suit before the suit was commenced cannot be made parties by an order of revivor. Where a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void; but, on the fact being brought before the Court, such orders will be made as may be just.

1 *Dangar v. Stewart*, 9 W. R. 206, V. C. K. The order is made in Chancery: *Timpson v. London & Northwestern Railway Company*, 11 W. R. 568, M. R., and L.J.J. For form of order, see *Seton*, 1166, No. 7.

2 *Bryan v. Twigg*, 3 Eq. Rep. 02, V. C. K. 3 *Theobald v. Barrar*, *Seton*, 1166 No. 8.

4 *Atkinson v. Parker*, 2 De G. M. & C. 221: 16 Jur. 1006. For form of order, see *Seton*, 1167, No. 19.

5 *Noble v. Stew.* (No. 2), 30 Beav. 512: 8 Jur. N. S. 147.

6 *James v. Harding*, 3 W. R. 474, V. C. W.; *Wastall v. Leslie*, *Seton*, 1170; *Freeman v. Peaslington*, 3 De G. F. & J. 295; *Williamson v. Jeffereys*, 12 W. R. 403, V. C. W.; *Brandon v. Prandon*, 3 N. R. 287, V. C. K.; but see *Greenhalgh v. Rummey*, 5 N. R. 368, V. C. W. It is not, however, generally necessary to bring an assignee *pendente lite* before the Court.

7 *Eyre v. Brett*, 18 W. R. 732, M. R.; *ib.* 763, L. J.J.; and see *Jackson v. Ward*, 1 Glf. 20: 5 Jur. N. S. 732; *Gilbert v. Tomlinson*, 6 Jur. N. S. 532; 8 W. R. 467, V. C. S.

8 *Watson v. Loveday*, 3 W. R. 386, V. C. W.; *Dendy v. Dendy*, 5 W. R. 221, V. C. W.; *Williams v. Williams*, 9 W. R. 296, V. C. K.; *Brooke v. Brooke*, *ib.* 304, V. C. K.; *Laurie v. Crush*, 32 Beav. 117: 9 Jur. N. S. 463, M. R.

9 *Jervoise v. Clark*, 2 W. R. 337, V. C. K.; *Johnson v. Hammersley*, 24 Beav. 498: see *Greenhalgh v. Rummey*, *ubi sup.*; see, however, *Hall v. Clive*, 20 Beav. 576; *Pedder v. Pedder*, 5 Jur. N. S. 1145, M. R.

10 *Gustlon v. Rotch*, 1 Dr. & Sm. 621; and see *Stahle v. Winter*, 3 W. R. 590, M. R.

11 *Geddes v. Allen*, 1 Cham. Rep. 336. 12 *Smith v. Lines*, 1 Cham. Rep. 398.

Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the Court made an order, at the instance of the defendants, staying proceedings until all proper parties should be brought before the Court.¹ When a suit becomes defective, and is proceeded with, without an order of revivor being taken out, a subsequent application, by petition, to supply the defect by adding parties, is not improper; but the new parties may not be bound by the proceedings had in their absence.²

The common order to revive has been made in the following cases: On the application of the heir at law and administrator of a sole plaintiff, in a foreclosure suit;³ on the application of the personal representative,⁴ or devisee⁵ of a sole plaintiff; on the application of the surviving plaintiffs, where the suit abated by the death of one of several co-plaintiffs;⁶ on the application of a plaintiff against a co-plaintiff, on whom a new interest had devolved;⁷ on the application of one of several co-tenants, who had obtained an order for liberty to attend the proceedings, in a suit which had abated by the death of the sole plaintiff, his co-tenant;⁸ and on the application of the plaintiff against the devisee;⁹ and against the personal representative of a defendant.¹⁰ Where a married woman, in England, who had obtained a protection order,¹¹ was made a defendant, as a *feme sole*, and the protection order was afterwards discharged, the usual order to revive and carry on the proceedings, against her and her husband, was made on motion.¹²

An assignment or alienation, *pendente lite*, is not permitted to affect the rights of the other parties: unless the alienation dis-

1 *McKenzie v. McDonnell*, 15 Grant, 442.

2 *Pecke v. Buake*, 2 Cham. Rep. 294

3 *Ward v. Shakeshaft*, 1 Dr. & Sm. 607; *Fane v. Richards*, 11 W. R. 524, M. R.

4 *Moritt v. Waiton*, 2 W. R. 544, V. C. K.; *Flockton v. Snee*, 5 Jur. N. S. 422; 7 W. R. 323, M. R.;

Pindar v. Pindar, there cited: *Seton*, 1169; *Eyre v. Brett*, 13 W. R. 732 M. R.; *ib.* 763 L.J.J.

5 *Jackson v. Word*, *Gilbert v. Tomlinson*, and *Eyre v. Brett*, *ubi sup.*

6 *Hall v. Clives*, 20 Beav. 575; *Smith v. Horsfall*, 24 Beav. 331; *Ure v. Lord*, 2 Dr. & Sm. 263; 10 Jur.

N. S. 1042; but see *Hinde v. Morton*, 2 H. & M. 368. For form of order; see *Seton*, 1165, No. 3.

7 *Foster v. Bonner*, 33 L. J. Ch. 384, V. C. K.

8 *Dobson v. Faithwaite*, 10 W. R. 153, L.J.J.; reversing *ib.* 39 Beav. 228; 8 Jur. N. S. 26.

9 *Low v. Watson*, 1 Sm. & G. 123.

10 *Martin v. Radlow*, 16 Jur. 964; 9 Hare, App. 52; *Petre v. Petre*, 1 W. R. 362, V. C. K.; *Martin v.*

Purnell, 3 W. R. 365, L. J.J.

11 Under 20 & 21 Vic. c. 85.

12 *Rudge v. Weedon*, 4 De G. & J. 216; 5 Jur. N. S. 723; *ib.* 330, V. C. K.

ables the party from performing the decree of the Court : in which case, the assignee must be brought before the Court by supplemental order.¹ Where the assignment, *pendente lite*, is of an equitable interest, and not, as in the case of bankruptcy, by operation of law, there is not any absolute necessity for the assignee to be brought before the Court; nor does it seem to be material, whether the assignee is a plaintiff or defendant to the bill.² In such a case, however, unless the alienee can be protected by the ordinary course, of obtaining an order that the alienor shall not take the fund he is entitled to in the suit, out of Court, without notice to him, or by an order giving him liberty to attend the proceedings under the decree, he must himself institute independent proceedings.³

When the order of revivor is made against the personal representatives of an accounting party, the usual accounts of the estate of the deceased defendant will, if required, be ordered to be taken, if they do not admit assets.⁴

In those cases where the Court will not make the order to revive and carry on the proceedings on an *ex parte* application by motion or petition, a supplemental bill must be filed, by and against the persons by and against whom the proceedings are sought to be carried on.⁵

An order of revivor may be made after the lapse of a long period; and such an order was made against defendant's representatives ten years after a demurrer was allowed with leave to amend;⁶ but after a lapse of more than twenty years, and where all the parties to the original suit were dead, the order was refused;⁷ and the right to such an order is not, it seems, barred by lapse of time, but it is in the discretion of the Court.⁸

1 Ld. Red. 74; *James v. Harding*, 8 W. R. 474, V. C. W.; *Williamson v. Jeffereys*, 12 W. R. 403, V. C. W.; and for form of order against new trustees appointed *pendente lite*, see *ib.*

2 *Eades v. Harris*, 1 Y. & C. C. C. 230, 234; see, however, *Solomon v. Solomon*, 13 Sim. 516; *Johann v. Thomas*, 11 Beav. 501.

3 *Foster v. Deacon*, 6 Madd. 59; *Toosey v. Burchell*, Jac. 159.

4 *Edwards v. Bailey*, 19 Beav. 457; *Cartwright v. Shephard*, 20 Beav. 122; overruling *Tate v. Lethhead*, 9 Hare, App. 51; S. C. nom. *Tate v. Lighthhead*, 16 Jur. 904. For form of order, see *Seton*, 1164, No. 2.

5 *Dendy v. Dendy*, 5 W. R. 221, V. C. W.; *Williams v. Williams*, 9 W. R. 296, V. C. K.; *Brooks v. Brooks*, *ib.* 804, V. C. K.; *Guillon v. Rotch*, 1 Dr. & Sm. 621; *Greenhalgh v. Ramsey*, 5 N. R. 468, V. C. W. For forms of decrees on supplemental bill, see *Seton*, 1174, 1175.

6 *Deeks v. Stanhope*, 1 Jur. N. S. 418, V. C. K.

7 *Bland v. Davison*, 21 Beav. 312.

8 *Alsop v. Bell*, 24 Beav. 451, 464.

Until a defendant has appeared, there is strictly speaking no cause in Court against him ; and therefore, if his interest should determine before he has appeared, no order of revivor can be obtained against the person in whom his interest has become vested ; but an original bill must be filed against him : which bill may be supplemental as against the other defendants, if any.¹

In some cases, where the suit abates by the death of a party who has no legal personal representative, the Court will either appoint some one to represent the estate of such party ;² or will allow the suit to proceed in the absence of any such representative. In the latter case, no order of revivor is necessary : in the former, the suit must be revived, in the usual way, against the person appointed to represent the estate of the deceased party.³ The cases in which the Court will dispense with the personal representative of a deceased party, or appoint some one to represent his estate, are the same as those in which it would have made a similar order, if the suit had been instituted after the death of the party, and have been before fully considered.⁴ Where one of several plaintiffs, claiming as next of kin, died before decree without any legal personal representative, the Court ordered the suit to be revived, at the instance of the surviving plaintiffs, against the same defendants ; and did not require any representative of the deceased plaintiff to be appointed ;⁵ but where one of three plaintiffs, suing as residuary legatees died, before decree, no order to revive was held to be necessary.⁶

Proceedings by special case,⁷ and administration order,⁸ may, in case of abatement, be revived, by an order of course, in the same manner as an abated suit.

The party obtaining the order to revive may, if resident out of the jurisdiction, be ordered to give security for costs.⁹

1 *Blond v. Davison* 21 Beav. 312 ; *Williams v. Jackson*, 5 Jur. N. S. 264 : 7 W. R. 104, V. C. ; *Hardy v. Hull*, 14 Sim. 21 ; *Foster v. Foster*, 16 Sim. 637 ; *Asbee v. Shipley*, 6 Madd. 296 ; *Crowfoot v. Mander*, 9 Sim. 396 ; *Eddington v. Banham*, 2 Coll. 619.

2 Under Order 56. 3 *Bliss v. Putman*, 29 Beav. 20 ; and see *Seton*, 1178—1181.

4 *Ante*, and see *Leycester v. Norris*, 10 Jur. N. S. 1173 : 13 W. R. 201, V. C. K., where the estate being insolvent the personal representatives of a deceased plaintiff, who had been beneficially interested were dispensed with.

5 *Ure v. Lord*, 2 Dr. & Sm. 263 : 10 Jur. N. S. 1042 ; and see *Smith v. Horsfall*, 24 Beav. 331 ; *Leycester v. Norris*, 10 Jur. N. S. 1173 : 13 W. R. 201, V. C. K. ; but see *Hinde v. Morton*, 2 H. & M. 308.

6 *Hinde v. Morton*, 2 H. & M. 308.

7 *Wilson v. Whateley*, 1 J. & H. 331.

8 *Pedder v. Pedder*, 5 Jur. N. S. 1145, M. R.

Jackson v. Davenport, 29 Beav. 212 : 7 Jur. N. S. 1224.

The Court will not, in general, permit a suit to be revived, for the purpose of deciding the question of costs only:¹ the general rule being, that if a party dies before taxation of costs, there can be no revivor, in respect of costs only, against his personal representatives.² This rule does not, of course, apply where anything else is directed by the decree, which remains unexecuted. "If, by the decree," says Lord Chief Baron Gilbert, "the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deed, or writings, or if anything is annexed to the decree besides costs, the suit may be revived."³

The rule applies only to costs which remain untaxed, at the time when the abatement takes place. Where the costs have been actually taxed, and the Master's certificate signed, there may be a revivor for them:⁴ because, when taxed, they become a judgment debt; and as at Law a judgment may be revived, so it may in Equity.⁵ And where the plaintiff's solicitor, at the request of the defendant's solicitor, had agreed to postpone the taxation of costs, decreed to be paid to the plaintiff, on an undertaking that the plaintiff should not be prejudiced thereby, and the plaintiff died after the costs were taxed, but before the Master's certificate had been signed, his representatives were allowed to revive the suit: upon the ground that the undertaking amounted to an agreement that the suit should be revived.⁶ But the circumstances of that case were very special, and cannot be considered as impugning the general rule.

A distinction has been attempted to be made, between an abatement by the death of the party to pay the costs, and an abatement by the death of the party to receive them: holding, in the latter case, that there may be a revivor for costs;⁷ but, in *Jupp v. Geering*,⁸ Sir John Leach, V.C., held, on demurrer, that if the

1 *Ld. Red.* 202; *Gibb. For. Rom.* 181.

2 *Morgan v. Scudamore*, 2 Ves. J. 813, 316; *Andrews v. Lockwood*, 15 Sim. 153, 156; 10 Jur. 277; but see 8 C. 2 Phil. 598, 11 Jur. 950; *Bowyer v. Beaumish*, 2 Jo. & Lat. 228; *Maitins v. Greenway*, 7 Hare 591; *Robertson v. Southgate*, 13 Jur. 538; *Umpleby v. Waveney Valley Railway Company*, 1 J. & H. 254; *Beames on Costs*, 181, and the cases cited, *ib. n. (b)*; *Morgan & Davey*, 384, *et. seq.*

3 *Gibb. For. Rom.* 181; *Johnson v. Peck*, 2 Ves. J. 485.

4 *Lowten v. Corporation of Colechester*, 2 Mer. 113, 114; *Beames on Costs*, 182, and the cases cited, *ib. n. (k)*.

5 *Ibid.*; *Edgill v. Browne*, 1 Dick. 62; *Blewer v. Morrets*, 3 Atk. 772; *Loador v. Price*, 2 Fowler's Ex. Pr. 309.

6 *Tucker v. Watkins*, 7 Sim. 349.

7 *Beames on Costs*; and see *Morgan v. Scudamore*, 2 Ves. J. 813; 3 Ves. 196.

8 5 Madd. 376.

defendant dies before the costs of a bill dismissed are taxed, a bill of revivor by his representatives for costs cannot be sustained.

The only exceptions to the general rule above laid down, that there can be no revivor for costs only, which have not been taxed before the abatement happened, are : where they are directed to be paid out of a particular estate or fund ;¹ or are decreed against an executor, out of assets :² in which cases, they are considered as a charge or lien upon the estate, and not upon the person and, therefore, do not come within the principle of Courts of Law, (on analogy to which the rule is founded,) that "*actio personalis moritur cum persona.*"³ The fact that the bill prays specifically for costs, does not take the case out of the general rule.⁴

Where one of several defendants, against whom the bill had been dismissed with costs, to be taxed and paid by the plaintiff, died, it was held that the survivors were entitled to proceed with the taxation, without reviving the suit, where the surviving and deceased defendants had carried in a joint bill of costs ;⁵ but where the deceased defendant appeared separately, the Court refused to direct the taxation to proceed without a revivor.⁶

Where the interest of the plaintiff wholly determines on his death, the suit cannot, on that event happening, be revived ; but a new bill must be filed :⁷ in which new suit, the benefit of the proceedings in the former suit may, if prayed for, be obtained.

Where a defendant, whose interest ceases on that event, dies, the suit may, it seems, be revived against the person who thereupon becomes entitled to his interest. Thus, where a defendant, a tenant in tail, died, the suit was revived by the common order of revivor and supplement, against the next tenant in tail.⁸

Where in a suit by churchwardens for securing legacies given to the parish, some of the plaintiffs ceased to fill the office of church-

1 *Blower v. Morretts*, 3 Atk. 772 ; *Kemp v. Mackrell*, ib. 812 ; 2 Ves. 8. 580 ; *Johnson v. Leake*, cited 3 Atk. 773 ; *Jenour v. Jenour*, 10 Ves. 562, 572.

2 *Beaumont v. Beaumont*, 132.

3 *Broom's Maxims*, 860, et seq.

4 *Umpleby v. Wapensy Valley Railway Company*, 1 J. & H. 264.

5 *Hunter v. Daniel*, 7 Hare 231.

6 *Robertson v. Southgate*, ib. 109 ; 12 Jur. 583 ; *Malins v. Greenway*, 7 Hare 391.

7 *Watts v. Watts*, Johns. 681 ; and see *Wordsworth v. Parkins*, 12 W. R. 120 V. C. K.

8 *Cresswell v. Bateman*, 6 W. R. 206, 220, V. C. K., where the abatement occurred through the death of a defendant : see Reg. Lib. 1867, A. 424 ; and see *Lloyd v. Johns*, 9 Ves. 58 ; Ld. Red. 67, 71.

warden, an order was made by the Master of the Rolls, directing the suit to be carried on, in the names of such of the plaintiffs as continued in office, and the successors of the others.¹

Any person served with an order of revivor, or a supplemental order, may apply to the Court, to discharge the order, within fourteen days after service; or, if he is under disability, (other than coverture,) within fourteen days after a guardian *ad litem* has been appointed for him.²

The order may be discharged on any ground which would have been open to the applicant on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon.³ The order will, therefore, be discharged: if there is no sufficient ground for reviving the suit,⁴ either by or against the person by or against whom it is sought to be revived,⁵ or, if the revivor is solely for costs which have not been taxed, unless the case comes within any of the exceptions to the general rule above pointed out.⁶

The defendants, though aware that A. had no interest in the matters in question made him a party plaintiff by order of revivor obtained on *præcipe*. A. was then and for some time afterwards under the belief that he had been made a party properly; and even after he had found out that he had been made a party improperly, he did not apply to have the order of revivor set aside as against him till he found that he was prejudiced by it. He then petitioned to have the order set aside as against him; and the Court granted the application, on the terms of his paying the costs of the petition, and any costs that had been incurred by his having been made a party.⁷ Where, after a defendant's lands were seized under a writ of sequestration, the defendant died intestate, it was *held* that his widow was not a proper party to the order to revive. A motion to discharge an order to revive cannot, without leave of the Court, be made after fourteen days from the service of the order; and mere

1 *Smith v. Creasy*, cited Seton, 1167.

2 Ord. 330-340.

3 Order 330.

4 *Harris v. Pollard*, 3 P. Wms. 348; *Humphreys v. Ingleton*, 1 Dick. 38; and see 1 Eq. Ca. Ab. 2-4.

5 *University College v. Fozcroft*, 2 Cham. Rep. 244; Ld. Rep. 201.

6 *Ante*, *Umpleby v. Waveney Valley Railway Company*, 1 J. & H. 254.

7 *Smith v. Gunn*, 2 Cham. Rep. 230.

service of notice within the fourteen days is not a sufficient compliance with Order 339. The notice of motion in such a case need not set forth the previous proceedings.¹ A motion before a Judge to set aside an order to revive was held to be too late after the lapse of fourteen days.²

The question, whether the Statute of Limitations is a bar to revivor, has been much discussed. It seems, however, that the Statute applies to suits before decree;³ but that, after a decree for an account, it is in the discretion of the Court; and the order of revivor will be discharged, only where there appears to have been negligence or *laches* on the part of the applicant.⁴ If the party entitled to object to the order of revivor proceeds with the suit, before taking the objection, the objection will be waived.⁵

Where the abatement is total, that is, where it is caused by the death, bankruptcy, or insolvency, of the plaintiff, or the marriage of a female plaintiff, the cause is completely suspended; and cannot be proceeded in, until it has been revived, or the defect, caused by the abatement, cured; and, in general, all orders made pending such abatement, will be considered nugatory, and may be discharged; the same rule also applies, where the abatement has been caused by the death of one or more plaintiffs. Thus, if, pending a total abatement, process of contempt is issued, it is irregular, and may be discharged, on motion, with costs.⁶ So, also, an order to dismiss a bill for want of prosecution, obtained pending an abatement, is irregular.⁷

Although the general rule is as above stated, there are many cases in which the Court will entertain applications, notwithstanding that the suit is abated. Thus, a motion may be made, to discharge process of contempt issued or executed pending an abatement.

¹ *Harris v. Meyers*, 16 Grant, 117.

² *Mellroy v. Hawke*, 3 Cham. Rep. 66.

³ *Ld. Rep.* 290; *Hollingshead's case*, 1 P. Wms. 742, 743; see 2 Sch. & Lef. 632; *Earl of Egremont v. Hamilton*, 1 B. & B. 516; *Perry v. Jenkins*, 1 M. & C. 118, 121; *Bland v. Davison*, 21 Beav. 312.

⁴ *Higgins v. Shaw* 2 Dr. & War. 356; *Alsop v. Bell*, 24 Beav. 451, 464; and see *Parkinson v. Lucas*, 28 Beav. 627, 630.

⁵ *Jones v. Powell*, 11 Beav. 398.

⁶ See *Gibbs v. Churton*, C. P. Coop. 496.

⁷ *Sellers v. Dawson*, 2 Dick, 738; 8 C. nom. *Sellas v. Dawson*, 2 Anst. 458, n.; but see 1 Mer. 365; *Bodly v. Kent*, 46. 361, 365; *Robinson v. Norton*, 10 Beav. 484.

The Court will also, where the right to money in Court is clear under former orders and reports, make an order, for payment of the money out of Court, to the person entitled, without regarding the abatement;¹ for the delivery of deeds and writings, brought into Court, and will, if necessary, direct an inquiry to whom they belong.²

An enrolment of a decree may be made, notwithstanding an abatement.³

An abatement, although it suspends proceedings in a cause, does not put an end to them : therefore, where process of contempt has been executed, and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the plaintiff may revive within a limited time, or that the bill may be dismissed, and he may be discharged. So also, an injunction is not absolutely dissolved by an abatement, but the defendant must, if he wishes to get rid of the injunction, move, on notice, that the plaintiff may revive within a limited time, or that the injunction may be dissolved.⁴

The same observation applies to receivers appointed under an order of the Court : who will not be discharged on an abatement, without an order of the like description.

Where an abatement is partial : as, where it is caused by the death of a defendant : it prevents those proceedings only by which the interest of the deceased defendant may be affected : for the death of a defendant makes an abatement *quoad* himself alone ; and therefore, if there is a decree against trustees and their *cestui que trust* to convey, and the *cestui que trust* dies, the trustees may be compelled to convey, notwithstanding such death.⁵ So also, pending an abatement by the death of a defendant, process of

1 *Roundell v. Curren*, 6 Ves. 250 ; see also *Beard v. Earl of Powis*, 2 Ves. 8. 399 ; and see *Jones v. Williams*, C. P. Coop. 488.

2 *Wharam v. Bronghton*, 1 Ves. S. 181, 185 ; and see *Andrews v. Lockwood*, 2 Phil. 398 : 11 Jur. 956 ; *Alderman v. Bannister*, 9 Beav. 516 ; *Houghton v. Godschall*, 2 C. P. Coop. t. Cott. 89.

3 *Ante*.

4 *Jones v. Massey*, 3 Beav. 295, n. ; *Turner v. Colo*, *ib.* ; *Browne v. Warner*, *ib.* 296, n. ; *Lee v. Lee*, 1 Hare, 617, 622 ; *Fisher v. Fisher*, 4 Hare, 196. This will not apply to injunctions made perpetual by decree : see *Askew v. Townsend*, 3 Dick. 471 ; *Oldfield v. Cobbett*, 20 Beav. 262.

5 *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2, pl. 7.

contempt may be issued and executed against the other defendants ; and, we have before seen, that, during such an abatement, the Court will, at the instance of a creditor, take the prosecution of a decree from the plaintiff.

It has also been held, that the death of a defendant, after hearing but before judgment, does not prevent judgment, nor, in general, the drawing up of the decree ;¹ but where, upon a motion to dismiss for want of prosecution, the plaintiff appears and undertakes to set the cause down for hearing within a limited time, in default of which the bill is to stand dismissed, and afterwards the defendant dies, and the time for setting the cause down expires before the suit can be revived, the order dismissing the bill is suspended during the abatement.²

Where the abatement of a suit is total, an order to revive places the suit, and all the proceedings in it, in precisely the " same plight and condition as the same were in at the time of the abatement " ³ and the new plaintiff may take the same proceedings in the cause that the original plaintiff might have done. Thus, the plaintiff in a revived suit may amend the original bill, and issue an attachment against the defendant for not answering the amended bill.⁴ So also, the new plaintiff may prosecute process of contempt against the defendant : taking it up where it left off at the abatement ; and if process has been issued before the abatement, it will be revived by the order to revive.⁵

The case is different where the abatement is occasioned by the death of the defendant : in such case, the process, being personal, cannot be revived. In general, however, where an abatement is occasioned by the death of a defendant, the order to revive against the representatives of such defendant will place the suit as fully in the same position, with regard to such representatives, as can be done, with reference to the change of the individuals before the Court.

¹ *Davies v. Davies*, 9 Ves. 461 ; *Belsham v. Perreval*, 2 C. P. Coop. t. Cott. 176 : 8 Hare, 157 ; *Collinson v. Lister*, 20 Beav. 355 : 1 Jur. N. S. 835.

² *Gregson v. Oswald*, 1 Cox. 343, 344.

³ See form of order, *Seton*, 1164, No. 1 : *Gregson v. Oswald*, 1 Cox. 343.

⁴ *Ld. Rep.* 78 ; *Phillips v. Derby*, 1 Dick. 98.

⁵ *Hyde v. Forster*, 1 Dick. 132.

In a foreclosure suit an account of principal and interest had been directed to be taken before the decree was drawn up ; before this was done the defendant died, and an application was now made by the plaintiff to be at liberty to take the usual account, upon the facts stated in the affidavit of the plaintiff. The decree, it was alleged, would bear date prior to the death of the defendant, and as the bill had been taken *pro confesso* against the defendant, the account, in the event of his being still alive, would have been proceeded with behind his back, the Orders of 1853 providing that all proceedings after a bill had been taken *pro confesso* may be taken *ex parte*. But the Chancellor said "drawing up a decree, which had been previously pronounced, after the death of one of the parties, is a proceeding that would be clearly regular ; but so far as my recollection of the cases goes, I do not think that any authority will be found warranting us in proceeding to take an account after the death of the party who is bound to pay. The point, however, is one of considerable importance to suitors, and perhaps it would be well to take the opinion of the full Court upon it."¹ If a sole defendant dies before the bill is served upon him, there is no suit in Court : the plaintiff therefore cannot revive ; and if he take out an order to revive, under such circumstances, it will be discharged with costs.²

The death of a party to a suit does not always occasion such an abatement as will suspend the proceedings. If the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest : which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible on a contingency : the suit does not so abate as to require any proceeding to warrant the prosecution of it against the remaining parties ; but if the party dying be the only plaintiff, or only defendant, there may be necessarily an end of the suit : no subject of litigation remaining.³

If, also, the whole interest of the party dying survives to another party, so that no claim can be made by or against the representa-

¹ *Galdbreath v. Armstrong*, 1 Cham. Rep. 33.

² *Watson v. Ham*, 1 Cham. Rep. 295.

³ *Ld. Red.* 58.

tives of the party dying: as if a bill be filed by, or against, joint-tenants, and one dies: the suit may be continued by or against the survivor, without revivor;¹ and where the suit is by or against trustees or executors, and one dies, not having possessed any of the property in question, or done any act relating to it which may be questioned in the suit, or by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives, the proceedings do not abate: although, as we have already seen, the wife is not bound to continue the suit, unless she thinks proper to do so.²

So, if a surviving party can sustain the suit: as in the case of several creditors, plaintiffs on behalf of themselves and other creditors: no revivor is necessary, because the representatives of the deceased plaintiff may come in under the decree.³

Where a creditors' suit had been carried on for twelve years after it had become abated by the plaintiff's death, an order was made, on motion, to confirm all the proceedings;⁴ and where at the date of the decree the suit had become abated by the death of a co-plaintiff, an order to revive the suit and carry on the proceedings was made, on his representatives submitting to be bound by the decree.⁵

Where, before decree, a defendant dies, and the plaintiff neglects to revive the suit against his legal representative, the representative may obtain an order on motion, of which notice must be given to the plaintiff, that he revive the suit within a limited time, or that the bill stand dismissed.⁶

Order 344 provides that "Where a suit is defective by means of some imperfection in the bill, and not in consequence of an event arising subsequent to its institution, the Court may at any time

1 *Fallowes v. Williamson*, 11 Ves. 306, 309; *Boddy v. Kent*, 1 Mer. 361, 364; but the case is different in the case of tenants in common: *ib.*

2 *Ld. Red.* 59; and see *ante*.

3 *Boddy v. Kent*, 1 Mer. 361, 364; *Hinde v. Morton*, 2 H. & M. 368; see, however, *Burney v. Morgan*, 1 S. & S. 358; *Smith v. Horsfall*, 24 Beav. 331.

4 *Houston v. Briscoe*, 7 W. R. 304, V. C. K.; and see *Lys v. Lee*, 4 De G. M. & G. 219; 17 Jur. 607; 10 Hare, App. 72; 17 Jur. 273.

5 *Smith v. Horsfall*, *ubi sup.*; see also *Jebb v. Tugwell*, 20 Beav. 461; *Freeman v. Whitbread*, 12 W. R. 619, V. C. K.

6 *Norton v. White*, 2 De G. M. & G. 678; *Powell v. Powell*, *ib.* n. (b)

permit an amendment of the bill in furtherance of justice, and on such terms as it thinks proper, for the purpose of altering the allegations in the bill, or putting new matter in issue, as well as for the purpose of adding or striking out the names of parties, or of varying the relief prayed, or praying further relief."

And Order 345, that "The order is to be applied for by motion, the notice of which is to state the required amendment; and to be served upon the parties, or their solicitors, unless dispensed with."

Order 346, provides that "Upon the motion the Court must be satisfied, by affidavit or otherwise, of the truth of the proposed amendment, and of the propriety of permitting it to be made at the particular stage of the cause, under all the circumstances."

And Order 347, that "Upon pronouncing such order for amendment, the Court is to give such order as to the future conduct of the suit, in relation to answering such amendments, as also with regard to the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require."

These orders, it will be observed refer only to cases of defect in the suit, not occasioned by an event subsequent to its institution. Provision is, however, made for cases where facts or circumstances have occurred after the filing of the bill.

The rule which formerly existed, that a plaintiff ought not to introduce facts, by amendment, which have occurred since the filing of the original bill, has been abolished. Our Order 348, taken from the Imperial Statute 15 & 16 Vic., ch. 86, provides that "Where, in a case not provided for by Order 344, a plaintiff desires to state, or put in issue, facts, or circumstances occurring after the institution of the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, such facts or circumstances may be introduced into the original bill of complaint by way of amendment." And Order 359, that "If the cause is not in such a state as to allow of the bill being amended, the plaintiff may state and put in issue such subsequently occurring facts and circumstances by filing a statement, either

written or printed, to be annexed to the bill." Order 350, declares that "No such statement is to be filed, unless accompanied by an affidavit that the matter thereof arose within two weeks next before the filing of such statement, or unless the Court otherwise order. A copy of the affidavit is to be served with a copy of the statement." And Order 351, that "Proceedings by way of answer and otherwise, are to be had and taken on the statement so filed, as if the same were embodied in a bill; but the Court may make any order which it thinks fit for accelerating the proceedings thereunder in any manner that is just and practicable."

The plaintiffs had obtained a judgment at law against P., one of the defendants, upon confession, and as judgment creditors under that judgment had filed their bill to set aside a prior judgment of other defendants, and had moved for and obtained an injunction to restrain a sale of the goods of P. under such prior judgment. After the injunction had been granted, the plaintiffs obtained another judgment against P. not upon confession, but by default. Under these circumstances, a motion for leave to amend the bill by alleging the recovery of the second judgment was granted.¹ Apart from any general orders this Court has power to permit an amendment of its own records; so that though the Orders of 6th June, 1862, did not provide, in some exceptional cases, for the introduction into the suit of matter arising subsequent to its institution, such matter was ordered to be introduced upon motion for leave to amend the bill.²

In England the clause of the Statute from which the Orders 348, 349, 350 & 351, have been taken (Imperial Statute 15 & 16 Vic., ch. 86, sec. 58,) have been held not to apply to cases where an amendment is desired after decree.³ In such a case by the English practice, a supplemental bill must be filed; but as "supplemental bills," and "original bills in the nature of supplemental bills," are abolished by our Order 6, it is presumed our Court would hold that these orders extend to cases of amendment after, as well as before decree.

¹ *Montreal Bank v. Auburn Exchange Bank*, 1 Cham Rep. 283.

² *Baird v. White*, 1 Cham. Rep. 276.

³ *Commerell v. Hall*, 2 Drew. 184.

If this be a correct view of these orders it will be necessary to state the English Law as to supplemental bills, for the principles of the English cases will apply :—the only difference being that in England a “supplemental bill” is used, while here a “supplemental statement” under these orders will be resorted to. With this explanation the following cases can be read without misleading.

A supplemental statement is only available for the purpose of stating new facts between the same parties ; and cannot be used for the purpose of adding parties.¹

A defendant, although he have the conduct of the suit, cannot file a supplemental statement ;² nor will the Court, on the application of the defendant, order the plaintiff to file a supplement statement.

A plaintiff cannot support a bad title by acquiring another after the filing of the original bill, and then bringing it forward, by supplemental bill or statement ;³ and the supplemental matter must not contradict the statements of the original bill.⁴ Where, however, the plaintiff has stated, in his original bill, a good inchoate title, which only requires some formal act to make it perfect, such act may be stated by supplemental bill or statement.⁵

A supplemental bill, after a decree, must be strictly in aid of that which the Court has already done ;⁶ it must not seek to vary the principle of the decree ; but must take the principle of the decree as a basis, and seek merely to supply any omission which there may be in the decree or in the proceedings, so as to enable the Court to give full effect to its decision.⁷ If it does more than this : if it makes a new case, or is inconsistent with, or impeaches

1 *Commerell v. Hall*, 2 Drew. 194 ; *Heath v. Chapman*, 17 Jur. 570 : 1 W. R. 344, V. C. K. ; *Heath v. Lewis*, 18 Beav. 527 ; *Williams v. Jackson*, 5 Jur. N. S. 284 : 7 W. R. 104, V. C. W. ; *Nicholson v. Gibb*, 2 W. R. 387, V. C. K. ; *Webb v. Wardle*, 11 Jur. N. S. 278, V. C. K.

2 *Lee v. Lee*, 9 Hare, App. 91 ; but he was allowed to file a supplemental bill : see 10 Hare, App. 72 : 17 Jur. 272 ; S. C. *nom. Lys v. Lee*, 4 De G. M. & G. 219 : 17 Jur. 607 ; and see *Berroe v. Morris*, 10 Beav. 437.

3 *Tomkin v. Lethbridge*, G. Coop. 43 ; *Davidson v. Foley*, 3 Brq. C. C. 593 ; *Pilkrington v. Wignall*, 2 Madd. 240, 244 ; *Pritchard v. Draper*, 1 R. & M. 191 ; and see *Attorney-General v. Portreeve of Avon*, 11 W. R. 1050, L. J.J. ; *Godfrey v. Tucker*, 35 Beav. 250 : 9 Jur. N. S. 1188, and cases cited 35 Beav. : 35, n. ; *Beardmore v. Gregory*, 2 H. & M. 491 : 11 Jur. N. S. 368.

4 *Tomson v. Judge*, 2 Drew. 414 ; but see *Allen v. Spring*, 22 Beav. 615 ; *Bolton v. Riddale*, 2 W. R. 488, L. J.J. ; *ib.* 451, V. C. S.

5 *Muler v. Chauvel*, 5 Russ. 42 ; *Sadler v. Lovett*, 1 Moll. 162.

6 *Wilson v. Todd*, 1 M. & C. 42, 47.

7 *Hodson v. Ball*, 1 Phil. 177, 182.

the decree: then it becomes a bill of review, or a supplemental bill in the nature of a bill of review, which cannot be filed. One of the tests of this is, whether the decree, if not referred to in the bill, could have been pleaded in bar of the relief prayed.¹ Thus, where the plaintiff, who had obtained a decree for an account, in the common form, sought, upon a supplemental bill, alleging new facts which had been discovered subsequently to the filing of the original bill, to obtain an account of what, but for their wilful neglect and default, the defendants might have received, the bill was ordered to be taken off the file for irregularity;² but where a defendant, who had the conduct of the cause, filed a supplemental bill, for a similar object, it was not considered irregular; and a decree was made upon it.³

Many of the causes of demurrer which apply to an original bill, will apply to a supplemental bill;⁴ but there are some grounds of demurrer which are applicable solely to supplemental bills. Thus, if a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur;⁵ although the bill contains an allegation that the facts were not known to the plaintiff till the original cause was at issue. But an objection to the bill on this ground cannot be sustained at the hearing.⁷ A defendant to a supplemental bill may also demur, if the same plaintiff files a supplemental bill, claiming the same matter as in his original bill, but upon a title totally distinct: as, where a plaintiff who had filed a bill to redeem a mortgage, as heir at law, was found not to be the heir, and he afterwards bought in the claim of a third person to the heirship, and filed a supplemental bill claiming under that purchase, a demurrer was allowed.⁸ A defendant may also demur, if a bill is brought against him, as a supplemental bill, upon matter arising subsequent to the time of

1 *Taylor v. Taylor*, 1 McN. & G. 397, 406; *Bainbrigge v. Baddley*, 2 Phil. 706, 708; *Toulinin v. Copland*, *ib.* 711, 715, overruling S. C. 4 Hare, 41.

2 *Hodson v. Ball*, 11 Sim. 456, 461: 1 Phil. 177, 182; and see observations of L. J. Turner on this case, 4 De G. M. & G. 221; see also *Wilson v. Todd*, 1 M. & C. 42, 46; *Newdigate v. Newdigate*, 8 Bligh. N. S. 734; *Toulinin v. Copland*, 2 Phil. 711, 715; *Tynne v. Hodge*, 13 W. R. 172, V. C. W.

3 *Berrow v. Morris*, 10 Beav. 437; and see *Shepherd v. Towgood*, T. & R. 379, 393.

4 *Ld. Red.* 201.

5 *Ld. Red.* 202.

6 *Colclough v. Evans*, 4 Sim. 76, 80; but see *Crompton v. Wombwell*, *ib.* 628, 633; and *Attorney-General v. Fishmongers' Company*, 4 M. & C. 1, 9.

7 *Ranger v. Great Western Railway Company*, 13 Sim. 368, 371.

8 *Tonkin v. Lethbridge*, G. Coop. 43; see *ante*, and see *Pilkington v. Wignall*, 2 Madd. 240, 244.

filing the original bill, and he claims no interest in the matters in litigation by the former bill.¹

Where the bill was framed as an original bill, but prayed that, "if necessary or proper, the suit might be taken as supplemental" to the former suit, and a demurrer for want of equity was put in on account of these words, the Court (without deciding whether the suit was properly a supplemental suit or not,) overruled the demurrer, with costs.²

A motion will not lie to take a supplemental bill off the file, for irregularity on the ground that it does not state supplemental matter. The proper course, in such case, is to demur.³

Besides those grounds of plea which are common to supplemental and original bills, if a supplemental bill is brought on matter which arose before the original bill was filed, and might have been introduced into the original bill, and this fact does not appear upon the supplemental bill, it may be pleaded.⁴

Pleas and demurrers to supplemental bills are subject to the same rules, both with respect to their form and substance, and to the practice arising upon them, as pleas and demurrers to original bills.

If the supplemental bill is filed after replication in the original suit, a separate replication may be filed in the supplemental suit;⁵ but although the original suit is brought to a hearing after replication filed, the supplemental suit may, if desired, be brought to a hearing on motion for decree;⁶ and where this course is adopted, the affidavits and other evidence filed in the cause may be set forth at the foot of the notice of motion for the decree, and thus used in the supplemental suit.⁷

1 *Ld. Red.* 302; and see *Baldwin v. Mackown*, 3 Atk. 817.

2 *Earl of Shrewsbury v. North Staffordshire Railway Company*, 9 Jur. N. S. 787: 11 W. R. 742. V. C. K.; and see observations of the V. C. on this form of prayer, *ib.*

3 *Bowyer v. Bright*, 18 Pri. 316.

4 Or a motion may, it seems, be made to take it off the file: *Ranger v. Great Western Railway Company*, 13 Sim. 368.

5 *Cotton v. Earl of Carlisle*, 6 Madd. 427. As to replication, see *ante*.

6 *Guyon v. Guyon*, 1 K. & J. 211. As to motions for decree, see *ante*.

7 *Guyon v. Guyon*, *ubi sup.*

It is to be recollected, that a supplemental suit is merely a continuation of the original suit; and that, whatever evidence was properly taken in the original suit, may be made use of in both suits, even though not entitled in the supplemental suit. Thus, evidence taken in the original suit may be read at the hearing of both causes; and this was permitted in a case where the original bill was filed by the plaintiff, a married woman, in a wrong name, (namely, as the widow of the testator, when her husband by a previous marriage was living,) and the object of the supplemental bill was to correct this error, and to bring her husband before the Court.¹

If there has been no decree in the original suit, before the supplemental bill is filed, the original and supplemental suits may come on for hearing together, (unless the supplemental bill is merely for discovery,) and one decree will be made in both.² But if a decree has been obtained before the event by which the supplemental bill was rendered necessary, though it is only a decree *nisi*,³ there must be a decree on the supplemental bill: for which purpose, the supplemental cause must be set down for hearing alone; or it may be heard with the original cause for further consideration: for which purpose, the Court will, if necessary, order the supplemental cause to be advanced.⁴

If the supplemental bill is filed after decree, it must be brought to a hearing on independent evidence; but the defendant cannot, upon such hearing, object that the decree in the original suit was wrong: he must submit to the usual supplemental decree, and appeal in both suits.⁵

¹ *Giles v. Giles*, 1 Keen, 685. As to evidence, see *ante*.

² *Ld. Rep.* 64, 76.

³ *Ld. Rep.* 64.

⁴ See *ante*. For forms of decrees on supplemental bills, see *Seton*, 1174, *et seq.*

⁵ *Jenkins v. Cross*, 15 Sim. 76.

CHAPTER XXXVI.

INTERLOCUTORY AND OTHER APPLICATIONS BY MOTION OR PETITION,
AND ORDERS THEREON.*Generally.*

An interlocutory application is a request made to the Court, or to a Judge in Chambers, for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the Court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the Court or Judge is required before, or in consequence of, a decree or order.

Interlocutory applications are extremely various; and the occasions upon which they may be made are too numerous to be discussed in a general Treatise of this nature. They may be made, either to the Judge at Chambers, or to the Court. Applications of this nature in Chambers have been already considered;¹ and it is proposed here to describe the mode in which they are made by motion or petition to the Court.

Interlocutory applications, when made *viva voce* to the Court, are called *motions*: when they are made in writing, they are called *petitions*. There does not appear to be any very distinct line of demarcation between the cases in which they should be made by motion, and those in which they should be made by petition; but, as a general rule, where any long or intricate statement of facts is required, the application should be made by petition; while, in other cases, a motion will be sufficient.² Although it is competent to the Court to order money in Court to be paid out, upon motion,

¹ *Ante.*² *Jones v. Roberts*, 12 Sim. 189.

it is generally done on petition,¹ where there is no jurisdiction on summons.² In like manner, all applications for orders, which partake more of the nature of decrees or of decretal orders than of interlocutory proceedings: such as applications founded upon a separate certificate:³ or to wind up or compromise suits,⁴ should be made by petition; and so, in general, must all applications to the Court, upon matters arising out of decrees or decretal orders:⁵ except those relating to the process of the Court, or for enforcing the performance of them, which are usually made upon motion.⁶ In *Lord Shipbrooke v. Lord Hinchinbrook*,⁷ Lord Erskine says "I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the Court to grant or refuse them, according to circumstances; but, generally speaking, motions, which have for their object the giving effect to decrees and orders, should be confined to cases where the order, which is to be made upon the motion, arises out of recent proceedings, upon which there is no doubt: for, as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the Court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conusant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."

A plaintiff having obtained a decree for payment of money, registered the same pursuant to the Statute 20 Vic., ch. 56, and applied on petition for an order to sell the lands affected by such registration. By the same petition he impeached a sale of the same lands made by the defendant to his mother, before the registration of the decree, and sought to have the sale declared fraudulent and

1 *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 394; *Heathcote v. Edwards*, Jac. 504; *Garratt v. Niblock*, 5 Beav. 143.

2 See ante.

3 Ante.

4 *Winthrop v. Winthrop*, 1 C. P. Coop. t. Cott. 201, 203; *Askew v. Millington*, 9 Hare, 65; *Richardson v. Eyton* 2 De G. M. & G. 79, 90; *Harrison v. Lane*, 2 Sm. & G. 249; *Dawson v. Newnome*, 6 Jur. N. S. 625; 6 W. R. 725, V. C. S.

5 See *Winter v. Innes*, 4 M. & C. 101, 106.

6 In *Nicholson v. Squire*, 16 Ves. 260. Lord Eldon said: "I cannot hear parties who are under commitment, except upon petition." Where a person, not a party to the cause, is injuriously affected by an injunction, he may apply by petition to set it aside: *Bourbaud v. Bourbaud*, 12 W. R. 1024, V. C. W.

7 13 Ves. 393.

void as against him, but the Court, though strongly impressed with the *mala fides* of the transaction, thought the question raised would be best decided in a suit to be brought to test the validity of the conveyance by the son.¹ A. having an interest in improvements, for which in a suit between B., his vendor, and C., B. obtained a decree—it was held that A. could not by petition make himself a party to such suit, and that his remedy was by bill.²

Although the Court refuses to entertain an application, on the ground that it ought to have been made in another branch of the Court, it may nevertheless order the applicant to pay the costs of the application.³ An order made by a branch of the Court which has not properly jurisdiction over the cause must, till discharged, be treated as a valid order; and the party affected by such order is not at liberty to treat it as a nullity, by obtaining another order inconsistent with it, from the proper branch of the Court.⁴

Interlocutory orders are either of course or special. Orders of course are those to which no opposition can be offered; and are drawn up without any direct application to the Judge. Special orders are those which the Court, in the exercise of its discretion, may either grant or refuse.

No notice need be given of the application for an order of course, as no opposition can be offered to it.⁵ If there is any irregularity in the order, or it has been obtained upon any false suggestion, or by the suppression of any material fact, it will be discharged on special application by motion: although on the merits it would have been proper to make the order.⁶

If an order has been irregularly obtained, the party who has obtained it should take the earliest opportunity of discharging it:

¹ *Fish v. Carnegie*, 7 Grant, 479.

² *Slater v. Young*, 11 Grant, 268.

³ *Cooper v. Knox*, 15 Beav. 102; *Yearsley v. Yearsley*, 19 Beav. 1.

⁴ *Boddy v. Kent*, 1 Mer. 361; *Wilkins v. Stevens*, 2 Phill. 113; 1 C. P. Coop. t. Cott. 338, 342.

⁵ *Blake v. Blake*, 7 Beav. 514; *Chuck v. Cremer*, 2 Phill. 113; 1 C. P. Coop. t. Cott. 338, 342.

⁶ *Eyles v. Ward*, Mos. 255. In some cases, however, where the application would otherwise be special, an order of course can only be obtained on the opposite party subscribing his consent thereto on the petition. The consent should be written opposite the prayer.

Harris v. Start, 4 M. & C. 261; *Brooks v. Purton*, 4 Beav. 484; *St. Victor v. Devereux*, 6 Beav. 584, 588; 8 Jur. 26; *Marquis of Hertford v. Suisse*, 7 Beav. 160; *Halcombe v. Antrobus*, 8 Beav. 405, 412; *Willin v. Nainby*, id. 486; *De Feucheres v. Dawes*, 11 Beav. 46; *Brignall v. Whitehead*, 30 Beav. 229; 8 Jur. N. S. 183; *Wyllie v. Ellice*, 12 Jur. 711, M. R.; *Cooper v. Lewis*, 1 Phill. 178.

otherwise, any party affected by it may procure its discharge, at the costs of the person who obtained it;¹ and, moreover, no subsequent order to the same effect can be obtained until it has been discharged.²

After an order of course has been obtained, it ought to be served, as soon as possible, upon the party intended to be affected by it, or his solicitor: for, although it does not seem that an order of course is absolutely no order until it is served (as it has been contended), yet, if the other party takes a step before the order is served, that step being in itself regular, the order which had been obtained and not served, cannot afterwards be acted upon, if it will interfere with the step so taken.³

After service, an order of course cannot be amended and subsequently re-served, so as to make the amended order, served after the time, regular.⁴

If it is intended to enforce the performance of the order by process of contempt, the order must be personally served upon the party to be affected by it, in the manner before explained;⁵ unless a special order has been obtained to authorise substituted service.⁶ In other cases, the service is made in the same manner as other service not required to be personal.⁷ Where an order was made for the payment of a sum of money by two solicitors, who were in copartnership, service of the order upon one, and leaving a copy at the place where the partnership business was carried on, was held not to be sufficient to ground a proceeding for a contempt.⁸

Interlocutory orders are enforced by attachment and other process of contempt, in the same manner as other orders.⁹

1 *Turbuck v. Turbuck*, 4 Beav. 149; *Lincoln v. Wright*, *id.* 166; and see *Davis v. Franklin*, 2 Beav. 369, 375.

2 *Pearce v. Gray*, 4 Beav. 127, 129.

3 *Church v. Marsh*, 2 Hare, 652; and see *Ballard v. Catling*, 2 Keen, 606.

4 *Wool v. Townsley*, 9 Beav. 41, 44.

5 *Ante.*

6 *Hunter v. —*, 6 Sim. 429; *Re Mourilyan*, 13 Beav. 84; *Re Wisewold*, 16 Beav. 357. As to substituted service, see *ante*.

7 *Ante.*

8 *Young v. Goodson*, 2 Russ. 255.

9 *Ante.*

Motions.

A motion is an application, either by a party to the proceedings, or his counsel, not founded upon any written statement addressed to the Court.

A motion may be made by or on behalf of any party to the record, provided such party is not in contempt.¹ A person who is *quasi* a party to the record, such as a claimant coming in under a decree, or a purchaser of an estate sold by order of the Court, may also apply to the Court in this manner: though it was formerly considered that he could only do so by petition.²

A motion is either of course, or special.

A motion of course requires no notice, as no opposition will be allowed to it.³

The times for the sittings of the Court, and for hearing motions have been fixed by a number of Orders, which are here introduced in full.

Order 590 provides that "A Judge will sit in Chambers every Monday, and on such other days as the state of business may require, to hear and dispose of such Chamber applications as cannot be heard and disposed of by the Referee."

Order 591 that "Appeals from the Referee in Chambers, or from local Masters and others when they are acting under Order 36 or under the Act for Quieting Titles, are to be heard in Chambers, and are to be set down for that purpose on or before the preceding Saturday. Seven clear days' notice is to be given of all appeals under the Act for Quieting Titles; and two clear days' notice of other appeals from the Referee in Chambers. All such appeals are to be argued by counsel."

¹ As to the effect of contempt, see *ante*, *Chuck v. Cremer*, 1 O. P. Coop. t. Cott. 247. An attachment issued against a party, after he has served a notice of motion, but before the motion made, will not prevent his making it: *Jeyes v. Foreman*, 6 Sim. 384. As to applications by a party in contempt, see *ante*.

² *Ante*, *Jones v. Roberts*, 12 Sim. 189.

³ See *Eyles v. Ward*, Mos. 255.

Order 592 that “ A Judge will sit in Court on Tuesday, Wednesday, and Thursday, and on such other days as the state of business may require, in every week, for the despatch of all business other than rehearings and Chamber business.”

Order 593 that “ The business before the Court will be taken as follows :

TUESDAY.—Motions.

WEDNESDAY.—Hearings *pro confesso* ; and on Bill and Answer ; Motions for Decree ; Further Directions ; Petitions ; Demurrers.

THURSDAY.—Appeals from Masters' Reports.

Order 594 that “ No orders of course, or orders made in Chambers, are to be entered, except :—

Decrees issued upon *Præcipe* ;

Decrees against Infants ;

Orders declaring persons Lunatics ;

“ for Administration ;

“ for the Sale of Infant's Estates ;

“ for Payment of Money into or out of Court ;

“ for Foreclosure or Sale ;

“ of Revivor ;

“ Vesting Orders ;

and such other orders as may from time to time in any particular case or otherwise be directed to be entered.”

Where an injunction is granted to a particular day which is not a motion day, and the writ is served, together with a notice of motion for that day to extend the injunction, the notice is not

irregular, though it omits to mention that such notice is given by leave of the Court.¹ A notice of motion given for a day, which is not a regular Court day, unless leave of the Court be obtained for that purpose, is a void proceeding, and the party served need not attend thereon.²

It may be convenient here to mention that in England, many motions are made by way of Summons:—in this Province the practice is simplified; for all proceedings, which in England would be taken either by Summons, or notice of motion, are here taken by the latter mode. With this explanation the English cases will be read without misconception.

Motions of course are granted without the Court being called upon to investigate the truth of any allegation or suggestion upon which they are founded, and are not mentioned in Court.

A special motion is one which it is not a matter of course to grant, but which the Court, in the exercise of its discretion, may, on the facts established in support of the application, either grant or refuse. Motions of this description may be made either *ex parte*, or upon notice.

Special *ex parte* motions are not limited to the ordinary motion days, but may be made to the Court at any time during its sittings; or, if the Court be not sitting, they may be made to one of the Judges, at his private house. In such cases, however, care must be taken to make the motion before the Judge who has properly the cognisance of the cause, unless it is made during vacation. If any material fact is suppressed at the hearing of an *ex parte* motion, the order may be discharged with costs.³

It is impossible to lay down any clear rule defining such motions as may be made *ex parte*, and distinguishing them from such as require notice. The General Orders usually state whether any applications to be made under their provisions require notice or not; and special applications concerning the proceedings in the

¹ *Johnson v. Cass*, 11 Grant, 117.

² *Stevenson v. Hoffman*, 4 Grant, 318.

³ *Sturgeson v. Hooker*, 1 De G. & S. 484; *Dalglish v. Jarvie*, 2 McN. & G. 231, 243; see also *Rr Recs.* 12 Beav. 256.

cause, not regulated either by the General Orders, or by any clearly defined rule of practice, must almost always be made upon notice.¹

Where an order was made that a case should stand over, with liberty to the plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs, and the plaintiff having made default, the defendant obtained an order to dismiss without notice, it was held that the order was regularly obtained; and an application to discharge it was refused.²

When the application to be made to the Court is not of course, or does not come within that class of special applications which the Court permits to be made *ex parte*, a statement in writing of the terms of the motion must be served upon the adverse party or his solicitor, before the day on which the motion is intended to be made. This statement is termed a notice of motion.

Unopposed motions may be made on any day while the Court is sitting;³ but the Court appoints special days for the hearing of motions; and whenever a motion of importance is required to be made on another day than one of the days appropriated to motions, special leave must be obtained to give notice of the motion for that day.

A notice of motion must be properly entitled in the cause or matter in which the application is to be made.⁴ It must be correctly addressed to the solicitor of the party or parties intended to be affected by it,⁵ or to the party himself where he acts in person, or personal service is intended; and be signed by, or in the name of, the solicitor, or firm of solicitors, of the party moving, or of the party himself where he acts in person. A notice of motion by a party suing or defending *in forma pauperis* (except for the discharge of his solicitor), must be signed by the solicitor of such pauper.⁶ A notice of motion must state the day on which the motion is to be made: which must, as we have just seen, be one of

¹ *Marshall v. Mellersh*, 5 Beav. 496.

² *Dobede v. Edwards*, 11 Sim. 454.

³ *Chaffers v. Baker*, 5 De G. M. & G. 482; 1 Jur. N. S. 32.

⁴ *Rowlatt v. Cattell*, 2 Hare, 186; *Solomon v. Stalman*, 4 Beav. 243; *Davis v. Barrett*, 7 Beav. 171;

Pollard v. Doyle, 2 W. R. 509, V. C. K.

⁵ *Moody v. Hebbard*, 11 Jur. 241, V. C. W.; and see *Hutchinson v. Horner*, 9 Jur. 615, V. C. W.;

Parker v. Francis, *ib.* 616, V. C. E., n.

⁶ *Perry v. Walker*, 4 Beav. 452; 5 Jur. 1081.

the days appointed for motions, unless special leave has been obtained to give the notice of motion for another day. The notice, however, though it expresses the day when the motion is to be made, usually adds "or so soon after as counsel can be heard;"¹ and whenever a motion is to be made "by leave of the Court," the notice ought to mention that it is so made: otherwise, the party against whom it is to be made may disregard it.²

A notice of motion must state clearly the terms of the order which will be asked for; and where the object is to discharge an order for irregularity, it is usual, but not necessary, to state the ground of the application.³ It may include several objects: such as, the appointment of a receiver, an injunction, and the payment of money into Court. Where separate motions were made for two objects, which might have been obtained by one motion, the Court made a special order, directing the party making such motions to pay the extra costs occasioned by the irregular proceeding.⁴

Where it is intended to read affidavits or depositions at the hearing of a motion, the intention to do so must be mentioned in the notice of motion: otherwise they cannot be read.⁵ But it is not necessary to state in a notice of motion, that a certificate of an officer to the Court will be read in support of the application; such certificate can be read though no such notice be given.⁶ All erasures and interlineations in affidavits must be initialed by the Commissioner before whom they are sworn, otherwise they cannot be read. The notice of motion in referring to an affidavit should state the day on which it was filed.⁷ It is no objection to a motion made by leave of a Judge that the name of the Judge granting leave is not given in the notice of motion.⁸

No person ought to join in a notice of motion who is not interested in the result of the application; and so strictly was this rule adhered to, that where the name of an uninterested party was

¹ See *Re Electric Telegraph Company of Ireland, Ex parte, Budd*, 10 W. R. 4, L J J.

² *Hill v. Rimell*, 8 Slim. 632; 2 Jur. 45; 2 M. & C. 641; *Jacklin v. Wilkins*, 6 Beav. 607; *Moggridge v. Thomas* 2 C. P. Coop. t. Cott. 186; *Chambers v. Toyubee*, 12 W. R. 1100, V. C. K.

³ *Brown v. Robertson*, 2 Phill. 173; and see *Lambert v. Hill*, 1 Dr. & War. 74.

⁴ *Hawke v. Kemp*, 3 Beav. 238.

⁵ *Farish v. Martyn*, 1 Grant, 300.

⁶ *Cooper's Dig.* 393.

⁷ *McMartin v. Dartnell*, 2 Cham. Rep. 322.

⁸ *Lindsay Petroleum Co. v. Hurd*, 2 Cham. Rep. 387.

inserted in the notice, with the names of others who were entitled to apply, the Court refused the whole motion.¹

As a general rule, no person can be heard in support of a motion, unless he is one of the parties who gave the notice.² If the object of the application is to discharge or vary a Chief Clerk's certificate, it seems that all persons interested in the certificate are entitled to be heard against the application.³

A motion cannot be made on behalf of the relators in an information: it must be made on behalf of the Attorney-General.⁴ Where the applicant is an infant,⁵ or a married woman, without her husband,⁶ or other persons under disability,⁷ the motion is made by the infant, married woman, or other person, by a next friend. Where a person, already acting as next friend, refuses to join in the motion, a next friend must be named for the purpose of the application;⁸ and if no next friend is named in the notice, the solicitor giving the notice of motion may be ordered personally to pay the costs.⁹

A notice of motion for any process of contempt or commitment must be served personally upon the party to be affected by it unless an order is obtained for substituted service. In other cases the notice should be served in the manner before explained.¹⁰

The application for substituted service of a notice of motion is made by *ex parte* motion, supported by affidavit.¹¹

If any of the persons upon whom the notice of motion is sought to be served are out of the jurisdiction of the Court, they will, it is presumed, be served under Rule 6 of Order 7, of the Orders of 10th January 1863. Order 90 of the Consolidated General Orders of 1868 is copied from this order as far as, and including Rule 5. Rule 6 provides that "the time within which any party served with any

1 *Folland v. Lemotte*, 10 Sim. 486.

2 *Stubbs v. Sargan*, 3 Beav. 408; and see *Jaquet v. Jaquet*, 7 W. R. 543, M. R.

3 *Johnston v. Todd*, 5 Beav. 394, 396; and see *ante*, and *Bonser v. Cox*, 4 Beav. 379.

4 *Attorney-General v. Wright*, 3 Beav. 447.

5 *Pidduck v. Boulthbee*, 2 Sim. N. S. 223; see *ante*.

6 *Pearse v. Cole*, 16 Jur. 214, V.C.K.; see *ante*. As to suits by husband and wife, or her alone, without a next friend, see *ibid.* and see *Cooney v. Girvin*, 1 Cham. Rep. 94.

7 See *ante*.

8 *Cox v. Wright*, 9 Jur. N. S. 921; 11 W. R. V.C.K.; and see *Guy v. Guy*, 2 Beav. 460; *Furtado v. Furtado*, 6 Jur. 227, L. C.; as explained in *Cox v. Wright*, *ubi sup.*; and see *ante*.

9 *Pearse v. Cole*, 16 Jur. 214, V. C. R.

10 *Ante*.

11 As to substituted service, see *ante*.

petition, notice, or other proceeding other than a bill of complaint, is to answer or appear to the same, is to be the same time as prescribed for answering or demurring to a bill of complaint, according to the locality of service." Although this is omitted in the late Consolidated Orders, it is presumed to be still in force under Order 2.

"A copy of any order giving leave to serve the notice out of the jurisdiction, or to effect substituted service, must be served with the notice of motion. It is presumed that the power to authorise the service of notices of motion abroad, is co-extensive with that to authorise the service of the copy of the bill.¹

Where the motion was made against a foreign corporation which had an office in this country, service of the notice of motion on the company at that office was held sufficient.²

Order 262 provides that "a notice of motion by a party to the suit, may be served with the bill, or at any time after the bill is served without the leave of the Court" and Order 263 that "there must be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion, unless the Court or a Judge gives special leave to the contrary: and in the computation of such two clear days, Sundays, and days on which the offices are closed, are not to be reckoned."

The practitioner will bear in mind that Order 261 provides that "all the affidavits upon which a notice of motion, or petition is founded must be filed before the service of the notice of motion or petition; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion or petition."

There must be two clear days between the service of a notice and the day for hearing the motion, and in the computation thereof Sunday is not to be reckoned. The meaning of the order is that

1 *Ante*, *Green v. Pledger*, 3 Hare, 166 : 8 Jur. 801 ; *Vicomtesse Haywarden v. Dunlop*, 10 W. R. 623, V. C. K.

2 *Maclaren v. Stainton*, 16 Beav. 279.

3 *Re Crooks*, 1 Cham. Rep. 304, overruling *Sprague v. Henderson*, 1 Cham. Rep. 213 : where it was held that, when Sunday is an intermediate day, it is reckoned in the computation of the time for service of papers. But see *Wilson v. Gould*, 2 Cham. Rep. 236, and *Kelly v. Smith*, 1 Cham. Rep. 264.

when the service is made on Saturday, the next day, Sunday, is not counted—or where it is made on Friday it will not be reckoned. Sunday must not be computed either where it is the first or the last day of the computation—but in all others cases it is reckoned.

Leave to serve short notice of motion will be given, whenever the circumstances of the case require it ; but it cannot be implied from the fact that leave has been given to serve notice of motion for a particular day.¹

Service of a notice of motion is effected by delivering a true copy of the notice to the person on whom the service is made.

The person who serves the notice should, after serving it, make an affidavit of the service : to be used, in case the party served should not appear when the motion is made.

The affidavit of service ought, in strictness, to be made and filed before the motion is made. It may, however, be filed afterwards ; but no order will be drawn up on an affidavit of service of a notice of motion or petition, unless it is made and filed, at the latest, before the rising of the Court on the day on which the application is made.² If this is not done, or the affidavit is not sufficient, a new notice of motion must be given ;³ and an order taken upon an affidavit of service may be discharged for any irregularity.⁴

According to the general rule of the Court, upon motion days, the Judge calls upon each counsel in Court, in turn, according to their seniority,⁵ to move ; each counsel, when called upon, has a right to make two motions before the next counsel is called upon. If, upon going through the bar, all the motions are not exhausted, the same process is gone through, *toties quoties*, till all the motions are disposed of. In the Court of Appeal, however, motions are set down in the paper, and called on in their order.

1 *Hart v. Tulk*, 6 Hare, 611, 612 ; see *Newton v. Chorlton*, 10 Hare, App. 31, as to motions made by special leave of the Court

2 *Lord Millican v. Stuart*, 8 Sim. 34.

3 *Barton v. Chambers*, 4 Beav. 547.

4 *Solomon v. Stalman*, 4 Beav. 243.

5 *Soltau v. De Held*, 15 Jur. 1151, V. C. K.

If a counsel is unable to make a motion, of which notice is given, on the day named, "or so soon after as counsel can be heard," he may save his notice of motion till the next motion day;¹ but if he omits either to make the motion or to save it, the opposite party may, when all the motions are exhausted, or at the next motion day, apply for his costs of the motion.²

A motion is made by the counsel to whom it is entrusted;³ who, in making it, reads the notice of motion, and the evidence entered into on behalf of the party for whom the motion is made. He cannot, however, read any affidavits filed before the date of his notice of motion, unless notice of his intention to read them has been duly served on the opposite party.⁴

The solicitor for the party against whom a motion is to be made should search the Record and Writ Clerks' Office, up to the morning of the day on which the motion is to be made, to ascertain whether any affidavits have been filed; but this search need not be carried back beyond the day of the date of the notice.⁵ The same thing should be done by the solicitor for the party making the motion, in order to ascertain whether affidavits have been filed on the other side. If the motion is not made on the day named in the notice, a party filing a further affidavit ought to give notice of his having done so to the opposite party.

In giving notice of motion, and that the party moving will read certain affidavits, if the same are filed at any time before the date of the notice of motion, the notice must state the day of the filing thereof, otherwise the affidavits cannot be used on the motion.⁶ Where a notice of motion to commit for breach of an injunction had been given for Good Friday, the Court refused to entertain the motion at the next sitting.⁷ The following order and decisions as to the entitling of affidavits and other papers may be here intro-

1 *Re Bamcoen Iron Company*, 17 Jur. 127, V. C. S.; see *post*.

2 See *post*. Where, however, a motion of which notice was given for the 29th June, was ordered on that day to stand over till the next motion day, 6th July, but was not then either brought on or saved, it was held that the moving party was entitled to make the motion up to the close of the following motion day, being the 13th July: *Wedderburne v. Llewellyn*, 13 W. R. 939, V. C. W.

3 Counsel's brief will consist of the evidence in support of and in opposition to the motion, and such observations as may be deemed necessary. A copy of the notice of motion must be annexed; and in general, prints of the bills and answers should accompany.

4 *Clement v. Griffith*, C. P. Coop. 470.

5 *Ibid*.

6 *Fraser v. Fraser*, 13 Grant, 183.

7 *Pitzgerald v. Phillips*, 3 Grant, 536.

duced : After a bill has been dismissed against one defendant, the style of the cause, as it originally was, should be continued. It is not necessary to omit the name of the defendant against whom the bill has been dismissed, and the retention of the name is not irregular. *Sed quere*, would it be irregular if the name were omitted?¹ Affidavits, &c., need not in their entitling distinguish the parties by original and amended bill—it is sufficient to describe them as the now parties to the suit.² Affidavits styled in short form “ A. *vs* B. and other plaintiffs, and C. D. and other defendants ” were held to be sufficiently styled and allowed to be read.³ Our Order 597 provides that “ in all proceedings in a cause, except Bills, Petitions in the nature of Bills, Decrees, and Decretal Orders, the following short style of cause shall be sufficient: “ *Between John Smith and others, Plaintiffs, and Richard Roe and others, Defendants.*” In case “ of proceedings which it has been the practice to entitle more shortly thus, *Smith v. Roe*, such practice is to continue.”

If an affidavit which has been filed upon or in opposition to a motion, requires an answer, but it has been filed so recently that an affidavit in answer cannot be procured, the party affected by it should, if he be the party moving, save his notice of motion till a future day ; or, if he be the respondent, he should ask that the motion may stand over, in order that he may file an affidavit in answer.

In a pressing case, the affidavits have been allowed to be sworn in Court ;⁴ but except under very special circumstances, the Court will not allow affidavits filed since the motion was opened to be read.⁵ It seems, however, that the admission of evidence must depend on the circumstances of each case ; and, that, on a motion for an injunction, counsel may make use of any affidavit filed before he addresses the Court.⁶

1 *U. C. Mining Company v. Attorney-General*, 2 Cham. Rep. 185.

2 *Somerville v. Kerr*, 2 Cham. Rep. 154.

3 *Dickey v. Heron*, 2 Cham. Rep. 490.

4 *Mercers' Company v. Great Northern Railway Company*, 14 Beav. 20.

5 *East Lancashire Railway Company v. Hattersley*, 8 Hare, 86; *Electric Telegraph Company v. Nott*, 11 Jur. 273, V. C. E. This rule extends to documents which it is intended to prove viva voce: *Bird v. Lake*, 1 H. & M. 111.

6 *Munro v. Wivenhoe and Brightlingsea Railway Company*, 13 W. R. 880, L.JJ.

Where one party gives notice of his intention to read an affidavit, but subsequently declines to do so, the other side may read it.¹

Formerly, the evidence on a motion could only be given by affidavit; but now, oral evidence may be made use of; and witnesses may be cross-examined upon any affidavits they may have made.² Unless otherwise directed by the Court, the examination and cross-examination take place before an examiner, in the manner previously described.³ In some cases, the Court has allowed the motion to stand over, in order that the cross-examination may take place.⁴

Order 266 provides that "A party in any cause or matter may, by a writ of subpoena *ad testificandum* or *duces tecum*, require the attendance of a witness before the Court, or before a Master, or an Examiner, for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court." Order 267, that "Forty-eight hours' notice of the examination is to be given to the opposite party, or parties, and the cross-examination, in such case, is to follow immediately upon the examination, and is not to be deferred to any future time." Order 268 that "Any person having made an affidavit to be used, or which should be used on any motion, petition or other proceeding before the Court, shall be bound to attend for the purpose of being cross-examined, on being served with a writ of subpoena *ad testificandum*, but the Court nevertheless, may act on the evidence before it at the time, and may make such *interim* order, or otherwise, as appears necessary to meet the justice of the case." And Order 269 that "Forty-eight hours' notice of the cross-examination is to be given to the party on whose behalf such affidavit was filed, or to the party intending to use the same."

1 *Cauty v. Houlditch*, 14 Sm. 75. Theoretically, a motion may stand over from time to time, until both sides have exhausted themselves in affidavits. Practically, the delay is lessened by conditions imposed by the Court, when the motion is mentioned: as, for instance, that the party opposing the motion shall file his affidavits by a certain day; and that the party moving shall file his affidavits (if any) in reply, by a certain subsequent day: though, even where such directions are given, it is difficult to shut out material evidence, solely on the ground of its not having been adduced in time: 1st Rep. Eng. & Ir. Com., App. 60.

2 Order 268; *Smith v. Swansea Dock Company*, 9 Hare, App. 20, n.

3 *Ante*.

4 *Normanville v. Stanning*, 10 Hare, App. 20; *Boomer v. Basineres*, Kay, App. 17; *Mayer v. Spence*, 1 J. & H. 87.

On a motion for an injunction against one defendant, the cross-examination of another defendant on his answer was held inadmissible in reply to the affidavits filed in answer to the motion, where the defendant, against whom the plaintiff moved had no notice of the cross-examination, or of the plaintiff's intention to read the depositions on the motion.¹ The Examiner is bound to allow a witness to be cross-examined on the whole case, without regard to his examination in chief; but in some cases he may exercise his discretion as to who should pay the fees of the examination.² Where a party to a suit having no solicitor is required to attend before a Master to be examined, it would seem that forty-eight hours' notice thereof shall be given to him.³ A defendant may be examined *viva voce* in support of a motion, notice of which has been given, although the time for answering has not elapsed.⁴ An application for an order for the defendant to attend at his own expense, and be examined on his answer, may be made *ex parte*.⁵ As a rule, a suitor has not a right to bring his opponent to Toronto, or elsewhere from his residence, for the purpose of interlocutory examination except upon special grounds. Where, therefore, an order had been made by the Secretary, for the plaintiff to attend before a special examiner at Toronto, the venue in the cause being laid in Goderich, and the parties residing there, and the plaintiff's solicitor residing there also, the solicitor for the examining defendant residing in Toronto; such order was rescinded upon the plaintiff refunding the conduct money paid him without costs, the defendant being held to have acted in accordance with what appeared to have been very generally understood in Toronto as the right of examining parties.⁶ The Court will take into consideration the fact that parties can be more efficiently examined in Toronto, than in some outer Counties, and will not consider alone the balance of convenience of the parties or solicitor attending.⁷

Evidence as to belief only is admissible on interlocutory applications;⁸ and the Court may also take notice of matters given in

¹ *Curtis v. Dales*, 12 Grant, 244.

² *Crandell v. Moon*, 6 U. C. L. J. 148.

³ *McClennaghan v. Buchanan*, 7 Grant, 92.

⁴ *Harrison v. Greer*, 2 Cham. Rep. 438.

⁵ *Gallagher v. Gairdner*, 2 Cham. Rep. 480.

⁶ *Kahn v. Redford*, 3 Cham. Rep. 55.

⁷ *Bird v. Lake*, 1 H. & M. 111. The grounds of belief should, however, be stated.

⁸ *Watson v. Ham*, 1 Cham. Rep. 293.

evidence on previous proceedings in the cause; and may refer to notes made by the Court on such occasions.¹

When the counsel who support the motion have concluded, the counsel in opposition to the motion are heard. The senior counsel for the party moving has then the right of reply: after which the Court pronounces its decision.²

The Court will not, upon motion, make an order which will decide the principal point of the cause, unless upon the consent of all the parties affected by it: which consent must be expressed by their counsel in Court, and cannot be inferred from their not attending in pursuance of the notice of motion.³ Nor will the Court, except by consent, extend the order upon a motion, beyond what is expressed in the notice: as, where the notice was, that the Court would be moved that the plaintiff might be put into possession, and a receiver appointed, the Court, though the defendant did not oppose the motion, would not direct that nothing should be received by the defendant in the meantime.⁴ It is, therefore, necessary, that everything the party wishes to be obtained upon his motion, should be expressed in the notice: otherwise, the Court will not grant it. This rule is strictly followed where the order is taken upon affidavit of service of the notice of motion; but an order which is less extensive than that asked by the notice may be granted if it will not prejudice the person against whom it is made.⁵

A motion for an injunction is often, by consent, turned into a motion for decree:⁶ in which case, leave to set the motion down for hearing should be obtained, so as to save the month's delay.⁷

At the hearing of a motion, the Court sometimes orders payment of the costs, and sometimes reserves them until further order;⁸ but

1 *Lister v. Leather*, 3 Jur. N. S. 433, V. C. W.; 1 De G. & J. 361.

2 For form of order on motion, see *Seton* 36.

3 *Luke v. Beresford*, 3 Bro. C. C. 366; *Skinner's Company v. Irish Society*, 1 M. & C. 162, 164; *Tullett v. Armstrong*, 1 Keen, 428, 435; but see *Bailey v. Ford*, 13 Sim. 496. An order to break up the soil, for the purposes of inspection, cannot be made on motion: *Ennor v. Barwell*, 1 De G. F. & J. 629; 6 Jur. N. S. 1233, 1236.

4 *Wyatt's P. R.* 287.

5 *Hutton v. Hepworth*, 6 Hare, 315, 317; 12 Jur. 885; and see *Powell v. Cockerell*, 4 Hare, 572; *Clark v. Jaques*, 11 Beav. 623; *Pratt v. Walker*, 19 Beav. 261.

6 See *Seton*, 871.

7 *Green v. Low*, (No. 1), 22 Beav. 395.

8 *Lewis v. Smith*, 1 McN. & G. 417, 421; *Warring v. Manchester, Sheffield & Lincolnshire Railway Company*, 14 Jur. 613, 616, V. C. W.; *Jones v. Batten*, 10 Hare, App. 11.

if no order is made, they become subject to the rules already pointed out with reference to "costs in the cause."¹

In general, where a motion is unsuccessful it will be refused with costs;² and where the party moving asks for something he is entitled to, and also for something he is not entitled to, he may be ordered to pay the costs of it although he succeeds.³

Where a motion stands over, and afterwards the party moving gives notice of abandoning the application, the costs which are given against him are not those of an abandoned motion, but of a motion refused.⁴ Where a party moving is not in a position to sustain his motion, the Court will not grant an enlargement so as to enable him to place himself in a position to sustain it, the motion must lapse.⁵

No order for payment of costs will be made on an *ex parte* motion.⁶

If the parties appear, the Court may deal with the costs of a motion, although the notice of motion does not state that they will be asked for;⁷ but a party against whom the order is taken upon affidavit of service, cannot be directed to pay the costs, if the notice of motion does not ask for them.⁸

If a party who is not interested in the result of a motion is served with the notice of motion, he will be entitled to the cost of appearing;⁹ and where a party, who had not been served with the notice, appeared on the hearing of the motion, at the request of the party who gave the notice, he was held to be entitled to his costs.¹⁰ Where, no proceedings having been taken in the cause for more than seven years a notice of motion was served on the solicitor for a deceased party it was held that it was proper for him to appear on the motion.¹¹

1 As to costs of applications by motion, see *Seton*, 91-94; *Morgan & Davey*, 31, *et seq.*

2 See *Dugdale v. Johnston*, 5 Hare, 92.

3 *Lancashire v. Lancashire*, 9 Beav. 120, 130; *Moet v. Couston*, 35 Beav. 578; and see *Sturch v. Young*, 5 Beav. 557.

4 *Dennison v. Devlin*, 11 Grant, 84.

5 *Ruttan v. Smith*, 1 Cham. Rep. 236.

6 *Nokes v. Gibbon*, 3 Jur. N. S. 232; 5 W. R. 216, V. C. K.; *Cast v. Poyser*, 26 L. J. Ch. 353, L.J.J.

7 *Clark v. Jacques*, 11 Beav. 623; *Butler v. Gardener*, 12 Beav. 525; *Powell v. Cockerell*, 4 Hare, 572; *Dawson v. Jay*, 2 W. R. 598, L. C.; *Tamylar v. Ingle*, 1 N. R. 159, V. C. K.

8 *Pratt v. Walker*, 19 Beav. 261.

9 *Heneage v. Aikin*, 1 J. & W. 377; *Bamford v. Watts*, 2 Beav. 201; *Major v. Major*, 13 Jur. 1, 207, L. C.; see *Bruce v. Kinlock*, 11 Beav. 432; *Tabuteau v. Waburton*, 4 Dr. & War. 287.

10 *Shaw v. Forrest*, 20 Beav. 249.

11 *Charlie v. Gwynne*, 9 Beav. 319.

Where a motion is refused with costs, the costs may be taxed without any special direction for that purpose.¹

Where the right of a party to an order for which he has given a notice of motion is intercepted by a step taken by the other side, he is entitled to his costs; but he should not bring on the motion, if the costs then incurred are tendered.²

In some cases, a party who succeeds in his motion may be ordered to pay the costs of it: thus, where he applies for an order by which he seeks an indulgence, he will, in general, be ordered to pay all the other parties their costs occasioned by the application.³ Upon this ground, where a plaintiff, in a foreclosure suit, obtained an order for the cause to be advanced, he was ordered to pay the costs of the motion.⁴

If a party gives a notice of motion, and does not move accordingly he is to pay to the other side costs, to be taxed by the Taxing Master, unless the court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs.⁵ In order to obtain the costs of an abandoned motion, the respondent must mention the motion to the Court not later than the motion day next after the day for which the notice was given;⁶ and the notice of motion must be produced to the Registrar on bespeaking the order.⁷ The order will not be made after the bill has been dismissed for want of prosecution;⁸ or at the hearing.⁹

A motion is considered to be abandoned, if not made or saved before the Court has disposed of the motions on the day for which the

1 Ord. 316; but see, as to this rule, *Seton*, 92. For form of order refusing a motion with costs, see *Seton*, 87, No. 6.

2 *Newton v. Ricketts*, 11 Beav. 164.

3 See *Cocks v. Purday*, 12 Beav. 451, 453; *Bartlett v. Harton*, 17 Beav. 479, 482; *Douglas v. Archbutt*, 23 Beav. 298; *Dakins v. Garratt*, 4 Jur. N. S. 579, V. C. K.; *Moss v. Syers*, 9 Jur. N. S. 1219; 11 W. R. 1047, V. C. K.

4 *Browne v. Lockhart*, 10 Sim. 420.

5 Formerly, if a party gave notice of a motion which he afterwards abandoned, he was not liable to pay to the other party his costs of appearing to oppose the motion, until a notice of the same motion had been given three times, without its being made, and then, upon a fourth notice, the opposite party might object to such motion being heard, until the costs of the three former motions were paid: *Shelly v. Shelly*, 8 Ves. 348; *Anderson v. Palmer*, 14 Ves. 151.

6 *Woodcock v. Onford, Worcester, & Wolverhampton Railway Company*, 10 Hare, App. 54, n. 17; *Jur. 33*, V. C. K.; *Gorely v. Gorely*, 25 Beav. 234; *Eccles v. Liverpool Borough Bank*, *Johns. 402*; but see *Wedderburne v. Llwallyn*, 13 W. R. 939, V. C. W., *ante*.

7 *Withey v. Haigh*, 3 Madd. 437; and see *Reg. Regul.* 15 March, 1860, r. 31.

8 *Farguharson v. Pitcher*, 4 Russ. 510.

9 *Eccles v. Liverpool Borough Bank*, *ubi sup.*

notice is given ;¹ or if, when it is before the Appeal Court, it is not made when called on.²

Where a motion by the plaintiff stood over, in consequence of the defendant undertaking to perform a certain act, and the undertaking was subsequently discharged, on his performing the required act, the motion was not treated as an abandoned motion, but the costs of it were reserved to the hearing.³

Where the plaintiff gave a notice of motion, but died before it was heard, and his executors, who subsequently revived the suit, declined to proceed with the motion, it was held that it could not be treated as an abandoned motion ;⁴ and that the costs of the motion were not costs in the cause.⁵

If the plaintiff amends his bill, after he has given a notice of motion for an injunction,⁶ or for a receiver,⁷ he thereby waives the notice ; and must pay the defendant's costs of the motion.⁸ Where, after notice of motion for an injunction had been served, a general demurrer to the bill was allowed, leave was given to amend, without prejudice to the notice of motion.⁹

Where an order has been made for the payment of the costs of an abandoned motion, a renewed motion to the same effect cannot be made, until the costs have been paid¹⁰

A motion to dismiss for want of prosecution having been refused with costs, it was held that another motion to dismiss could not be made till the costs of the prior one were paid, though it appeared that the plaintiff's solicitor had not taken out his certificate.¹¹ A party upon whom notice of motion has been served is not precluded from appearing on the return day, and claiming his costs of an

1 *Re Smith*, 23 Beav. 284 ; but see *Wedderburne v. Llewellyn*, 13 W. R. 939, V. C. W.

2 *Turner v. Turner*, 15 Jur. 1165, L. J.

3 *Felkin v. Lewis*, 11 W. R. 981, V. C. K. ; and see *Finden v. Stephens*, 12 Jur. 319, L. C.

4 *Warner v. Armstrong*, 4 Sim. 140.

5 *Lewis v. Armstrong*, 3 M. & K. 69.

6 *Martin v. Fust*, 8 Sim. 199 ; *Gouthwaite v. Rippon*, 1 Beav. 54 ; *Monypenny v. —*, 1 W. R. 99, V. C. T.

7 *Gouthwaite v. Rippon*, *ubi sup.* ; *Smith v. Dixon*, 12 W. R. 984, V. C. S.

8 *Monypenny v. —*, *ubi sup.* ; *London & Blackwell Railway Company v. Linehouse Board of Works*, 3 K. & J. 123 ; *Smith v. Dixon*, *ubi sup.*

9 *Rawlings v. Lambert*, 1 J. & H. 458 ; and see *Harding v. Tingey*, 10 Jur. N. S. 872 ; 12 W. R. 703, V. C. K.

10 *Bellahamby v. Giani*, 3 Madd. 550 ; *Davey v. Durrant*, 2 De G. & J. 506 ; 24 Beav. 411 ; 4 Jur. N. S. 898.

11 *Harris v. Ferguson*, 1 Cham. Rep. 218.

abandoned motion, notwithstanding notice of countermand served; unless the party serving notice of countermand offers at the time of service to pay any costs the other may have incurred in preparing to answer the motion.¹ When in a notice of motion an order is applied for in the alternative in the words "for such other order as shall seem meet." The Court will not make an order specially distinct from that asked for.²

An order made on a motion is drawn up, passed, and entered, in the usual manner.³

An order made upon motion may be discharged or varied upon motion: which may be made, either in the Court where the order was made, or in the Appeal Court,⁴ unless the order was made *ex parte*,⁵ or the application is made on the ground of irregularity:⁶ in both of which cases it must be made in the first instance to the Court by which the order was pronounced.

Where it is not intended to adduce new evidence, the application should be made to the Court of Appeal. The Court of Appeal may however, if it thinks fit, allow new evidence to be used before it,⁷ unless the application is to discharge the order as having been made on insufficient evidence: in which case the Court will only receive the evidence made use of on the former occasion.⁸ If the appellant succeeds on the new evidence, he will generally have to pay the costs of the former application.⁹

No deposit or certificate of counsel is required, on an appeal from an interlocutory order made on motion.¹⁰

The notice of motion is served in the usual manner.¹¹

Petitions.

A petition is the request of a person in writing, directed to the Judges and showing some matter or cause on which the petitioner prays their direction or order.

1 *Ross v. Robertson*, 2 U. C. L. J. N. S. 331.

2 *Graham v. Chalmers*, 2 U. C. L. J. N. S. 269.

3 For form of order on motion, see *Seton*, 36.

5 *Sturgeon v. Hooker*, 2 Phill. 289.

7 *Const v. Barr*, 2 Russ. 161, 163; *Re Joseph & Webster*, 1 R. & M. 498; *Whitworth v. Whydion*, 1 McN. & G. 56; *Pole v. Joel*, 2 De G. & J. 285; *Re Dixon*, 3 Jur. N. S. 29, L.J.J.

8 *Tanner v. Carter*, 1 C. P. Coop. v. Cott. 337.

9 *Williams v. Goodchild*, 2 Russ. 91.

4 *Ante*.

6 *West v. Smith*, 3 Beav. 306.

10 See *ante*.

11 *Ante*.

Petitions may be presented, either in a cause or in a matter over which the Court of Chancery, or a Judge thereof, has jurisdiction under some Act of Parliament, or other special authority; but a petition cannot be presented in a cause until the bill is filed.¹

Petitions are either: for orders of course; or, for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered. On petitions for special matters, a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained, as of course, upon petition.

A petition must be properly entitled in the cause or matter in which it is presented. A petition under the statutory jurisdiction must be entitled in the matter of the Act of Parliament under which the petition is presented, and of the particular trust, or property, or person to which it relates.

Petitions are under Order 416 to be heard on Wednesdays, Thursdays, Fridays, and Saturdays.

A petition must state by whom it is presented. If it is presented in a matter, or by a person who is not a party to the cause, the residence and description of the petitioner must be stated, as well as his name.² Where there is a misjoinder of petitioners, the Court has jurisdiction at the hearing of the petition to allow the same to be amended, by striking out the name of one of the petitioners.³

An infant,⁴ a married woman without her husband,⁵ or any other person under disability,⁶ petitions by a next friend; and a next friend, may be named for the purposes of the application.⁷

A petition presented on behalf of a pauper (except for the purpose of the discharge of his solicitor), must be signed by his solicitor. If the petitioner is resident out of the jurisdiction, he may be ordered to give security for costs, unless the petition is presented in a cause to which he is a party.⁸

¹ See, however, *ante*.

² *Glasbrook v. Gillatt*, 9 Beav. 492.

³ *Gilbert v. Jarvis*, 16 Grant, 294.

⁴ *Jones v. Lewis*, 1 De G. & S. 245, 252; *ante*.

⁵ *Howard v. Prince*, 14 Beav. 28; *ante*.

⁶ See *ante*.

⁷ See *ante*.

⁸ *Re Pasmore*, 1 Beav. 94; *Ex parte Seidler*, 12 Sim. 106; *Anon.*, *ib.* 262; *Ex parte Latta*, 3 De G. & S. 126; *Cochrane v. Fearon*, 18 Jur. 563, V. C. K.; *Atkins v. Cooke*, 3 Drew. 694; 3 Jur. N. S. 208; *Partington v. Reynolds*, 6 W. R. 307, V. C. K.; and see *ante*.

The petition must state the material facts upon which the application is founded; but care must be taken to avoid scandal,¹ and impertinence.² The statements are divided into paragraphs: which usually, though not compulsorily, are numbered, in consecutive order, as in a bill.³ The petition concludes by praying the Court to make the order required.

All petitions, except those which are of course, require service upon all parties interested; but if there is no other party interested in the matter, as in the case of petitions for the transfer or sale of stock, or the payment out of Court of money, standing to the separate account of the petitioner, no service is necessary.⁴

It was formerly necessary to obtain a judge's fiat to a petition, but Order 265 provides that "It shall not be necessary to procure a judge's fiat to a petition appointing a time and place for the hearing thereof, but in lieu of such fiat there is to be endorsed in the petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own showing as shall appear just." And Order 264 that "Except in cases where it is otherwise provided there must be, at least, two clear days between the service of a petition, and the day appointed for hearing the same; and, in the computation of such two clear days, Sundays, and days on which offices are closed, are not to be reckoned."

A petition for any process of contempt or commitment must be personally served upon the party to be affected by it: unless an order has been obtained for substituted service. In other cases, the petition is served in the manner before explained.

Service is effected by delivering to and leaving with the person served a true copy of the petition, endorsed as required by Order

¹ As to scandal, see *ante*.

² As to impertinence, see *ante*; and see *Re Bedminster Charities*, 12 Jur. 665, V. C. E.; *Re Manchester & Leeds Railway Company*, 8 Hare, 31; *Re Courtois* 10 Hare, App. 64; *Re Lilley*, 17 Sim. 110; and *Seton*, 89, No. 17.

³ See *ante*.

⁴ Under special circumstances, this rule as to service may be wholly or partially dispensed with: *Lambert v. Newark*, 3 De G. & S. 405; *Re Wise*, 5 De G. & S. 415; *Ex parte Peart*, 17 L. J. Ch. 168, V.C.K.B.; *Re Hodges*, 6 W. R. 487, V.C.K.

265, and at the same time showing him the original petition. An application for substituted service is made by *ex parte* motion, supported by affidavit.¹

Where the persons to be served are resident out of the jurisdiction, service is effected as in the case of a bill.

Where a petition is served upon an infant or a person of unsound mind, a guardian *ad litem* must be appointed, by whom he may appear.

The petitions are called on in their regular order; precedence is, in the first instance, generally given to unopposed petitions; and should any petitions remain undisposed of, at the end of the petition day, they are placed in an adjourned list: preserving their original order; and are taken generally on the next petition day, in priority to the opposed petitions in the new list.³

The rules with regard to reading affidavits, and the general practice as to evidence which may be used upon the hearing of petitions, are substantially the same as those with regard to motions.⁴ Where, after the affidavits had been sworn, the petition was amended, by altering the title, they were allowed to be used, on being made exhibits, and referred to in a short affidavit entitled in the new matter.⁵

Where two petitions in the same matter are answered for the same day, that which is first presented is entitled to be first heard.⁶

Where there is a petition and a cross-petition, and several respondents in the one join as co-petitioners in the other, the Court will not allow such respondents to be heard by separate counsel, except so far as their cases turn upon questions distinct from each other.⁷

¹ As to substituted service, see *ante*.

² *Re Barrington*, 27 Beav. 272; *Re Ward*, 2 Giff. 122: 6 Jur. N. S. 441; *Re Duke of Cleveland's Haris Estate*, 1 Dr. & Sm. 46; *Re Greaves*, 2 W. R. 353, L. C., & L.JJ.

³ 1st Rep. Eng. & Ir. Com., App. 70. As to the allowance of two counsel, on a petition, see *Sturge v. Dimdale*, 9 Beav. 170: 10 Jur. 277. Counsel's brief will consist of a brief copy of the petition and of the evidence on each side, together with such observations as may be deemed necessary.

⁴ See *ante*; see also *Jones v. Turnbull*, 17 Jur. 851, V. C. W.; *Re Pickance*, 10 Hare, App. 35; *Re Bendyshe*, 5 W. R. 816, V. C. K.

⁵ *Re Varieg Chapel*, 10 Hare, App. 37; and see *Re Harris*, 8 Jur. N. S. 166, V. C. K.

⁶ *Re Brookman*, 1 McN. & G. 199.

⁷ *Re Stephen*, 2 Phill. 562, 568.

The Court does not usually make any declaration as to the rights of the parties on a petition ; but, if necessary, it will preface the order by a statement of its opinion.¹

Where the evidence is complicated, or the persons entitled numerous, so that much time would be occupied in investigating the title in Court, the petition is often adjourned at once into Chambers.²

The practice, where a petition is adjourned to Chambers, and the manner in which the petition is brought on for further hearing in Court, where it is not finally disposed of in Chambers, has been already explained.

If, upon the petition being called on, any of the respondents do not appear, the Court, upon production of an affidavit of service of the petition upon the absent parties, will make an order according to the prayer, or such other order as may be just. If the petitioner does not appear, the petition will, on the application of the respondent, and production of an affidavit of his having been served with the petition, be dismissed with costs.³ In either case, the affidavit must be filed before the rising of the Court on that day.⁴

An order made upon a special petition is drawn up, passed, and entered in the usual manner.⁵

Where the original petition had been lost, the Court allowed the copy left for the use of the Judge to be filed instead of the original petition ;⁶ and where a petitioner, whose petition had been dismissed with costs, refused to deliver up the original petition in order that it might be filed, leave was given to the respondents to file, in its stead, the copy of the petition with which they had been served.⁷ The petitioner must pay the costs of such an application.⁸

A petition may, by leave of the Court, be amended. The amended petition does not, in general, require to be reanswered;⁹ and the amendments may state facts which have occurred since the presen-

1 *Seton*, 36 ; *Sharshaw v. Gibbs*, Kay, 333, 340 : 18 Jur. 330 ; and see *Re Walker*, 16 Jur. 1154, V. C. S.

2 *Seton*, 48.

3 *Dunbar v. Boldero*, 24 Jan. 1818, V. C. Leach, 2 *Madd. Pr.* 2nd ed. 581 ; 3rd ed. 767.

4 *Lord Milltown v. Stuart*, 8 Sim. 34.

5 For forms of orders on petition, see *Seton*, 34, 87.

6 *Smith v. Harwood*, 1 Sm. & G. 137 ; *Sanderson v. Walker*, 1 M. & C. 359.

7 *Andrews v. Walton*, 1 M. & C. 360 ; *Re Devonshire*, 32 Beav. 241.

8 *Ibid.*

9 *Robinson v. Harrison*, 1 Drew. 307 ; *Re Cartwright*, 8 W. R. 492, V. C. W. ; *Re Medow*, 10 Jur. N. S. 536 : 13 W. R. 595, V. C. K. ; and see *Maude v. Maude*, 5 De G. & S. 413.

tation of the petition¹ (but not since leave to amend it was given,² or introduce the names of new co-petitioners.³ Leave to amend will be given on the *ex parte* application of counsel. No formal order is usually drawn up; but the amendments in the original petition are made, or authenticated, by the Registrar, on production to him of counsel's brief, with his endorsement of the leave to amend, and containing the draft amendments. If necessary, the Registrar will countersign the endorsement on the brief.⁴ Leave to amend is almost of course; it is often given at the hearing;⁵ and has even been given after the order has been made.⁶ The amendments must not, however, state facts which would make the petition and order inconsistent. If the statements, proposed to be introduced by amendment, would have that effect, a new petition must be presented, stating such facts, and praying that the order may be varied.⁷

A party to a cause, who is served with a petition, but has no interest in the order to be made, will not be allowed his costs of appearing at the hearing.⁸ The same rule has also been applied to petitions presented in matters;⁹ but it would seem that, in such a case, a respondent ought to be allowed his costs: as otherwise he would have no opportunity of obtaining the costs which he must incur in taking advice whether he ought to appear on the petition.¹⁰

A person who unsuccessfully opposes a petition may be allowed his costs;¹¹ but a person who appears without having been served,¹² or who is served in consequence of an unfounded claim which he has made,¹³ is not entitled to his costs.

¹ *Robinson v. Harrison*, *ubi sup.*; but see *Re Keen*, 7 W. R. 577, V. C. K.

² *Maude v. Maude*, and *Re Cartwright*, *ubi sup.*

³ *Doubtfire v. Elworthy*, 15 Sim. 77; 9 Jur. 1083.

⁴ *Seton*, 36.

⁵ *Platt v. Routh*, 3 Beav. 257, 282; *Matson v. Swift*, 8 Beav. 368, 379; 9 Jur. 521; *Seton* 35.

⁶ *Hilop v. Wykeham*, 3 W. R. 286, V. C. K.; *Re Bunnnett*, 1 Jur. N. S. 921, V. C. W.; *contra Re Marrow*, C. & P. 142, 146.

⁷ *Re Keen*, 7 W. R. 577, V. C. K.; but see *Re Havelock*, 11 Jur. N. S. 906; 14 W. R. 26, V. C. W., where a supplemental order was made on the petition.

⁸ *Gayey v. Whittingham*, T. & R. 405; *Templeman v. Warrington*, 1 J. & W. 377, n.; *Barton v. Lalour*, 18 Beav. 526; *Day v. Croft*, 19 Beav. 518; *Herman v. Dunbar*, 23 Beav. 312; *Sidney v. Wilmer*, 31 Beav. 338; *contra, Bamford v. Watts*, 2 Beav. 201; *Crawshay v. Thornton*, 2 M. & C. 24; *Bruce v. Kinlock*, 11 Beav. 432; *Rovley v. Adams*, 16 Beav. 312; *Strong v. Strong*, 4 Jur. N. S. 943, V. C. S.; and see *Eden v. Thompson*, 2 H. & M. 6; and *Morgan & Davey*, 43.

⁹ *Re Justices of Coventry*, 19 Beav. 168; *Re Hertford Charities*, 19 Beav. 518, n. (c); *Re Birch*, 2 K. & J. 369; and see *Sidney v. Wilmer*, *ubi sup.*

¹⁰ *Re Third Burnt Tree Building Society* 16 Sim. 296; 12 Jur. 595; *Ex parte Queen's College*, 4 Jur. N. S. 19; 6 W. R. 9, V. C. S.; *Re Burnell*, 10 Jur. N. S. 289; 12 W. R. 588, V. C. K.; *Eden v. Thompson*, *ubi sup.* As to costs of application, by petition, see *Seton*, 91, *et seq.*; *Morgan & Davey*, 31, *et seq.*

¹¹ *Ex parte Stevens*, 2 Phil. 772, 774.

¹² *Bennett v. Biddle*, 10 Jur. 634, V. C. E.; *Ex parte Christ Church*, 9 W. R. 474, V. C. S.

¹³ *Re Shrewsbury School*, 1 McN. & G. 86; *Re Parry*, 12 Jur. 615, V. C. E.

When a person is about to present a petition, he should consider whether any of the other parties interested can be co-petitioners, instead of respondents; and, if so, he should apply to them to join with him in the petition: otherwise, he may be ordered to pay the costs of such persons, if made respondents.¹

Where two petitions are *bona fide* presented, for the same object by different parties, the costs of both will be allowed; but where it is known that one petition has been presented, the costs of a second petition, for the same purpose, will not be allowed.²

Orders made upon petition may be discharged or varied on motion where the application is made on the ground of irregularity. Thus, where the objection to the petition, and the order made thereupon, was, that they were entitled in a non-existing cause, the Court discharged the order on motion.³ If, however, the application is made on the merits, it must, as we have seen, be the subject of a regular rehearing;⁴ but the petition of appeal is considered as an original petition, and must, therefore, contain all the statements which were properly inserted in the former petition.⁵

The petition is presented and served, in the same manner as an original petition; and will be set down on one of the days appointed for the hearing of appeal petitions.

The rules as to the reception of new evidence, in the case of appeals from orders made on petition, are the same as in the case of appeals from orders made on motion.⁶

¹ *Melling v. Bird*, 17 Jur. 155, V. C. K.; and see *Haynes v. Barton*, 1 Dr. & Sm. 483; 7 Jur. N. S. 699; *Re Braye*, 9 Jur. N. S. 464; 11 W. R. 333, V. C. K.; *Re Long*, 10 Jur. N. S. 417, V. C. K.

² *Re Chaplin*, 33 L. J. Ch. 188, V. C. W.; and see *Re British & Foreign Gas Company*, 11 Jur. N. S. 559; 13 W. R. 649, V. C. S.

³ *West v. Smith*, 3 Beav. 306; and see *Binsted v. Barefoot*, 1 Dick. 112; *Bishop v. Willis*, 2 Ves. S. 113; *Clutton v. Pardon*, T. & R. 301, 303; *Ostle v. Christian*, *ib.* 324; *Eastwood v. Glendon*, 2 M. & K. 280; *Lees v. Nuttall*, *ib.* 284; *Barnardiston v. Gibbon*, cited *ib.* 287.

⁴ *Ante*.

⁵ *Ante*; *Richards v. Platel*, C. & P. 79, 84.

⁶ *Ante*.

CHAPTER XXXVII.

INJUNCTIONS AND RESTRAINING ORDERS.

Generally.

A writ of injunction is a judicial process, whereby a party is required to refrain from doing a particular thing, according to the exigency of the writ. The process is, therefore, rather preventive than restorative: though it is not confined to the former object.¹

Injunctions are either provisional or perpetual. Provisional injunctions are such as are to continue until a certain specified period: such as, the coming in of the defendant's answer; or the hearing of the cause.² Perpetual injunctions are such as form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually enjoined from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.

As a general rule, an injunction or restraining order will not be granted before decree, unless prayed for by the bill.³ At the hearing however, the Court will, where it is necessary for the purpose of complete justice, direct an injunction to issue: although it has not been prayed by the bill;⁴ and where the Court, having fully cognizance of the matter, has, by its decree, taken it into its own hands, it will, on the application of the defendant,⁵ as well as the plaintiff, interfere, by its injunction or restraining order, to prevent its decision from being questioned in another Court;⁶ or to restrain the bringing of actions inconsistent with the spirit of the decree: although

1 As to injunctions in Equity see *Add. Cont.* 1066; *Dreury* on Inj.; *Eden* on Inj.; *Jeremy* on Eq. 307; 2 L. C. Eq. 504-537; *Seton*, 867-901; *Story*, Eq. Jur. ss. 861-969.

2 Formerly, provisional injunctions were divided into common and special injunctions; but this distinction has been abolished.

3 *Ld. Rad.* 46, n. (z); *Sastry v. Dyer*, Amb. 70; *Wright v. Atkins*, 1 V. & B. 313, 314; *Wood v. Beadell*, 3 Sim. 273.

4 *Blomfield v. Byrne*, 8 Beav. 250, 259; 9 Jur. 717; *Reynell v. Sprye*, 1 De G. M. & G. 660, 690.

5 *Wedderburne v. Wedderburne*, 2 Beav. 208, 213; 4 Jur. 66; 4 M. & C. 585, 593, 596; *Booth v. Leicester*, 1 Keen, 579.

6 *Walker v. Micklethwait*, 1 Dr. & Sm. 49.

no injunction has been prayed by the bill.¹ The Court will also, under similar circumstances, interfere, to prevent injury to the property, either by the parties litigant or others. Thus, if, after a decree to account in a foreclosure suit, the mortgagor attempts to cut timber, the Court will enjoin him, although there is no injunction prayed by the bill.²

Upon the same principle, if there has been a decree for the administration of assets, the Court will restrain a creditor, who is not a party to the suit, from proceeding at law against the testator's or intestate's estate, for his debt.³ This it does, because it considers that the decree which it has made is in the nature of a judgment for all the creditors; and having taken the fund into its own hands it will administer it equitably, and not permit the executor to be pursued at Law.⁴ This practice of restraining a creditor, although no injunction has been prayed in terms against him, may be followed, where the creditor is suing in a foreign Court,⁵ if he has adopted the proceedings here, or a very strong case can be made out, showing the inexpediency of permitting him to continue the proceedings in the foreign Court.⁶

Our Order 284 provides that, "No injunction to stay proceedings at law is to be granted for default of an answer to the bill; but such injunction may be granted upon an interlocutory application, in like manner as other special injunctions are granted."

The action will be restrained on the application of the heir;⁷ of another creditor;⁸ of a common legatee; or even, as it seems, of a residuary legatee,⁹ as well as the legal personal representative.

1 *Grand Junction Canal Company v. Dimes*, 17 Sim. 34; 13 Jur. 779.

2 *Wright v. Atkins*, 1 V. & B. 313, 314; *Goodman v. Kine*, 8 Beav. 379; *Casamajor v. Strode*, 1 S. & S. 381; add see *Walton v. Johnston*, 15 Sim. 352; 12 Jur. 299; *King v. Smith*, 2 Hare, 230, 243; 7 Jur. 694.

3 For a collection of cases as to staying proceedings at Law by a creditor, after decree, with forms of orders, see *Seton*, 882 - 887; and as to staying concurrent suits after decree, see *ib.* 887 - 890.

4 *Martin v. Martin*, 1 Ves. S. 211, 214; *Morrice v. Bank of England*, Ca. t. Talb. 217. 226; 3 P. Wms. 401, n. (F); 3 Swanst. 573; S. C. nom. *Bank of England v. Morrice*, 2 Bro. P. C. ed. Toml. 445; *Faxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 34, 40, 41; *Clarke v. Earl of Ormonde*, Jac. 122. *Jackson v. Leaf*, 1 J. & W. 229, 231, 232, n. (b); *Drewry v. Thacker*, 3 Swanst. 541, 542, n.; *Lee v. Park*, 1 Keen, 714, 719; *Macrae v. Smith*, 2 K. & J. 411, 412.

5 *Graham v. Maxwell*, 1 McN. & G. 71; and see *Pennell v. Roy*, 3 De G. M. & G. 126; 17 Jur. 267.

6 *Carron Company v. McLaren*, 5 H. L. Ca. 416, reversing S. C. nom. *MacLaren v. Stainton*, 16 Beav. 279; and see S. C. 2 Jur. N. S. 49, L. C., & L. J.J.; and 21 Beav. 152; *Re Brett, Reynolds v. Lewis*, 8 W. R. 272, V. C. S.

7 *Martin v. Martin*, *ubi sup.*; *Rouse v. Jones*, 1 Phil. 462.

8 *Dyer v. Kearsley*, 2 Mer. 482; *Karl of Portarlington v. Damer*, 2 Phill. 262, 265.

9 *Brooks v. Reynolds*, 1 Bro. C. C. 183; and see *Clarke v. Earl of Ormonde*, Jac. 122.

There is no instance, however, in which a creditor at Law has ever been stopped, unless there was a decree giving him an absolute and unconditional right to come in and prove his debt at once: for, until there is such a decree, the creditor ought not to be deprived of the benefit of a prior judgment.¹ But when the decree has been made, it must be preferred, if it precedes the judgment in point of time:² although a creditor, who has obtained his judgment previously to the decree, will not be restrained from issuing execution;³ nor from obtaining the benefit of his judgment, by means of a garnishee order, under the 17 & 18 Vic. ch. 125, sec. 61.⁴

The action will be restrained, although the executor, or heir, may have pleaded *plene administravit*,⁵ or *riens per descent*;⁶ but the Court only interferes to give effect to its own decree, by restraining proceedings against the assets,⁷ and protecting the persons who have acted in accordance therewith; it will not interfere to protect an executor from any liability to which he may have, personally, subjected himself: therefore, if he has put in such a plea at Law as will entitle the creditor to a judgment *de bonis propriis*, or to a judgment *de bonis testatoris, et, si non, de bonis propriis*, the execution of it will not be restrained.⁸ What will amount to such a plea is not easily to be gathered from the cases; but it appears that all pleas, except a general issue, or *plene administravit*, would be considered to have that effect.⁹

Where an heir pleaded a false plea, execution was restrained against the assets; but not against him personally.¹⁰

In one case, where the executors had suffered judgment to go by default, Lord Eldon granted an injunction: considering, that an

1 *Rush v. Higgs*, 4 Ves. 638, 643; and see *Perry v. Phelps*, 10 Ves. 34; *Rankin v. Harwood*, 2 Phill. 22; *S. C. Ranken v. Harwood*, 5 Hare, 215; 10 Jur. 794.

2 *Largan v. Bowen*, 1 Sch. & Lef. 296, 299; *Lee v. Park*, 1 Keen, 714, 724; and see *Green v. Pledger*, 3 Hare, 166; *Whitaker v. Wright*, 2 Hare, 310; *Parker v. Ringham*, 33 Beav. 535.

3 *Lee v. Park*, *ubi sup.*; *Vincent v. Godson*, 3 De G. & S. 717, 726; *Ranken v. Harwood*, *ubi sup.*; *Marriage v. Skiggs*, *Re Skiggs*, 4 De G. & J. 4; 5 Jur. N. S. 325; and see *Horn v. Kilkenny Railway Company*, 1 K. & J. 399.

4 *Re Roberts*, *Fowler v. Roberts*, 2 Giff. 226; 6 Jur. N. S. 1189. As to attachment of debts and garnishee orders, see *Chitty's Arch.* 699, *et seq.*

5 *Vernon v. Thellusson*, 1 Phill. 466; *Kirby v. Barton*, 8 Beav. 45, 48.

6 *Rouse v. Jones*, 1 Phill. 462, 464.

7 *Kent v. Pickering*, 5 Sim. 569; *Burles v. Popplewell*, 10 Sim. 393.

8 *Terrywest v. Fetherby*, 2 Mer. 480; *Clarke v. Earl of Ormonde*, *ubi sup.*; *Lord v. Wormleighton*, *ib.* 148; *Price v. Evans*, 4 Sim. 514; *Kent v. Pickering*, *ubi sup.*; but see *Ratcliffe v. Winch*, 16 Beav. 576; 17 Jur. 586.

9 *Lee v. Park*, *ubi sup.*

10 *Price v. Evans*, 4 Sim. 514. As to proceedings at law against executors and administrators, see *Chitty's Arch.* 1216, *et seq.*; *Trower*, 286, *et seq.*

executor's suffering judgment to go by default was no more than saying that he was ready to do whatever a Court of Law or Equity might think proper.¹ But on another occasion, his Lordship intimated, that it is the duty of executors to apply at once for an injunction: for he took it to be clear, that if, after a decree to account, the executors should let judgment go by default, or should permit the creditor to proceed at Law, they would be responsible: they might indeed be allowed to stand in the place of those creditors against the estate, but they could not do more.²

The power of restraining a creditor will also be exercised, where an administration order has been made, in a suit commenced by summons;³ but not after an order directing preliminary accounts and inquiries.⁴

As the practice of granting restraining orders of this description might be liable to much abuse, by a friendly creditor filing a bill and obtaining a decree, it has been laid down as a rule, that an order to restrain a creditor from proceeding at Law, after a decree will not be granted without an admission of assets from the executor, or an affidavit from him as to what assets he has in his hands.⁵ This rule, however, does not apply, where the balance in the executor's hands has been stated in his answer;⁶ nor where the suit has been instituted by a legatee.⁷

The creditor is, unless his claim is unfounded,⁸ entitled to his costs in the action, up to the time when he first had notice of the decree; but not to his costs subsequently incurred.⁹ The fact, that, a creditor of an estate has proceeded at Law, after a decree for the administration of the estate of the testator has been obtained, is not sufficient to deprive him of his costs, either at Law, or of a motion in this Court to restrain his action.¹⁰ He will also be allowed his

1 *Dyer v. Kearsley*, 2 Mer. 482.

2 *Clarke v. Earl of Ormonde*, Jac. 108, 122.

3 *Ratcliffe v. Winch*, 16 Beav. 576; 17 Jur. 586; *Gardner v. Garrett*, 20 Beav. 409; *Re Brooker*, *Brooker v. Brooker*, 3 Sm. & G. 475; 3 Jur. N. S. 381.

4 *Teague v. Richards*, 11 Sim. 46, ante.

5 *Paxton v. Douglas*, 8 Ves. 520; *Cleverly v. Cleverly*, cited *ib.* 571; *Gilpin v. Lady Southampton*, 18 Ves. 469; *Drexory v. Thacker*, 3 Swanst. 546; *Clarke v. Earl of Ormonde*, Jac. 108, 122; *Ver-non v. Thellusson*, 1 Phill. 469; *Bookless v. Crummack*, C. P. Coop. 125; *Ladbroke v. Sloane*, 3 De G. & S. 291, 292; *Lawton v. Lawton*, 8 W. R. 458, M. R.; *Seton*, 387.

6 *Gilpin v. Lady Southampton*, 18 Ves. 469.

7 *Ratcliffe v. Winch*, 16 Beav. 576.

8 *King v. King*, 12 W. R. 1095, M. R.

9 *Paxton v. Douglas*, 8 Ves. 520; *Jackson v. Leaf*, 1 J. & W. 229, 231, 233; *Curre v. Bowyer*, 3 Madd. 456; *Jones v. Brain*, 2 Y. & C. C. C. 170; *Sharrod v. Winfield*, 1 Jur. N. S. 1154, V.C.M.; see *Seton*, 384.

10 *Re Langtry*, 18 Grant, 530.

costs of the application, unless his conduct has disentitled him thereto.¹ If assets are admitted, the creditor's costs are directed to be paid to him at once. If assets are not admitted, leave is given to add his costs to his claim; and to prove for the same in the suit.² If assets are admitted, but the debt is disputed, the creditor's costs will be directed to be paid, immediately on his establishing his claim.³

If the application is made after the account of debts has been taken, an inquiry as to the amount of the creditor's claim will, if necessary, be directed.⁴

An application to restrain a creditor from proceeding at Law is made by motion, of which notice must be given to him. Separate notices must be served on each creditor, suing separately.⁵

Under the present practice, the creditor's further proceedings in the matter are restrained by the order itself; and it is not usual to direct an injunction to issue for that purpose.⁶

An injunction may also be granted, without a bill being filed for that express purpose, where a plaintiff is proceeding against the defendant both in the Court of Chancery and in another Court, at the same time, and for the same matter. In such cases, as we have seen⁷ the defendant has a right to call upon the plaintiff to elect in which Court he will proceed; and then, if the plaintiff elects to proceed in Chancery, the Court will interfere, by injunction, to restrain him from further proceeding in the other Court. This remedy applies only where the plaintiff has not proceeded to a decree. After decree, the benefit of the order to elect is lost: because the plaintiff has already made his election, and the decree has decided the question between the parties. Under special circumstances however, the plaintiff will be permitted to sue the defendant, both under the decree, and in the other Court; but the plaintiff ought

1 *Re Langtry*, 18 Grant, 530; *Jones v. Jones*, 5 Sim. 678; *Graham v. Maxwell*, 1 McN. & G. 71, 78; *Cole v. Burgess*, Kay, App. 1; *Seton*, 883; and see *Gardner v. Garrett*, 20 Beav. 469; *Lawton v. Lawton*, 3 W. R. 458, M. R.

2 *West v. Swindurne*, 14 Jur. 360, V.C.K.B.; *Cole v. Burgess*, Kay, App. 1; *Davey v. Plestow*, 14 Jur. 888, V. C. Wigram; *Cankham v. Neale*, 26 Beav. 286. See form of order, in *Seton*, 882.

3 *King v. King*, 10 Jur. N. S. 762; 12 W. R. 1095, M. R.; and see *Davey v. Plestow*, *ubi sup.*; see also *Morgan & Davey*, 129, *at seq.*

4 *Sutton v. Mashiter*, 2 Sim. 513.

5 *Moseley v. Mowley*, 9 W. R. 531, V.C.S.

6 *Seton*, 883; and see form of order, *Seton*, 882; *Draithwaite's* Pr. 229.

7 *Seton*, 947.

before taking such steps, to apply for leave to the Court; and if he proceeds without such leave, the Court will restrain him, upon the application of the defendant.¹ It is not now usual to issue the injunction: service of the order to elect being sufficient;² but, if required, the injunction will be issued, on production of an office-copy of the election.³

Except in the cases above pointed out, an injunction will be granted on the application of a defendant, before decree, only under very special circumstances.

Another class of cases in which an injunction may be obtained, without a bill being filed for that purpose, has been already pointed out as proceeding from the jealousy entertained by the Court of any interference with its process by another tribunal: for which reason, the Court will protect persons who have acted under its decree from actions brought against them for so doing; and will even issue its injunction to restrain a person from proceeding in an action at Law, to recover damages for false imprisonment under process of contempt improperly issued.⁴

With the exceptions above enumerated, the rule is, that, before the Court will issue an injunction, a bill must be filed: of which bill a prayer for an injunction must form a part;⁵ and the injunction must be founded on the case alleged by the bill.⁷

The various cases in which this Court will interfere, by injunction, are almost as numerous as the matters which fall within its equitable jurisdiction: for, whenever a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, the Court will enjoin him, by means of this prohibitory writ, or by an order in the nature of it.⁸

1 *Weddeburne v. Weddeburne*, 2 Beav. 208, 213; 4 Jur. 66; *Phelps v. Prothero*, 7 De G. M. & G. 722, 734; 2 Jur. N. S. 173.

2 *Rraithwaite's Pr.* 220.

3 See *Seton*, 950.

4 *Russell v. London, Chatham, and Dover Railway Company*, 4 Giff. 403; S. C. *nom. Norman Scott*; *Russell v. London, Chatham, and Dover Railway Company*, 9 Jur. N. S. 1007; *Edgumbe v. Carpenter*, 1 Beav. 171.

5 *Froud v. Lawrence*, 1 J. & W. 655.

6 *Ante*.

7 *Cressy v. Beavan*, 13 Sm. 99; *Hertz v. Union Bank of London*, 1 Jur. N. S. 127, V. C. S.; *Burdett v. Hay*, 9 Jur. N. S. 1260; 12 W. R. 61, L. C.

8 For a collection of cases in which injunctions have been granted, and for forms of orders, see *Seton* 867, *et seq.*

In investigating this subject, it will be most convenient to consider, in the first place, the cases in which an injunction will not be granted.

The Court will not grant an injunction, or order in the nature of an injunction, to restrain persons from applying to the Legislature of this or a foreign country :¹ except where the application is made in breach of an express or implied agreement entered into by the parties, and relates to matters which are not of public interest. An injunction may, however, be granted to restrain a person from opposing such an application ;² or to prevent an improper appropriation of public funds, in promoting or opposing the application.³

The Court will also refuse an injunction to stay proceedings in any criminal matter.⁴ The Court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, an indictment, an information, or a writ of prohibition ;⁵ but this restriction applies only to cases where the parties, seeking redress by such proceedings, are not the plaintiffs in Equity: for, if they are, then they are subject to control by an order personally affecting them. If, for instance a suit were to be instituted to establish a right to land, and to quiet the possession, and after filing the bill the plaintiff should prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace and is also a civil right, "the Court," said Lord Hardwicke, "would certainly stop the proceedings upon such an indictment."⁶ Upon this principle his Lordship acted, in *Mayor of York v. Pilkington*,⁷ where a bill had been filed to establish a right of fishing, and the plaintiffs in the first cause indicted the agents of the defendants for a breach of the peace in fishing: there, an injunction was granted, with reference to what was civilly in question between the parties, though it was also the subject of a criminal prosecution: for, while the ques-

1 *Bill v. Sierra Nevada Company*, 1 De G. F. & J. 177; 6 Jur. N. S. 184; *Ware v. Grand Junction Waterworks Company* 2 R. & M. 470, 483; *Stockton and Hartlepool Railway Company v. Leeds and Thirsk Railway Company*, 2 Phill. 666, 670; *Heathcote v. North Staffordshire Railway Co.*; 2 McN. & G. 100, 108; *Leicester and Carlisle Railway Company v. North Western Railway Company*, 2 K. & J. 236.

2 *Stockton and Hartlepool Railway Company v. Leeds and Thirsk Railway Company*, *ibi sup.*

3 *Attorney-General v. Corporation of Norwich*, 16 Sim. 225, 229; *Attorney-General v. Guardian of Southampton*, 17 Sim. 6, 13; *Attorney-General v. Eastlake*, 11 Hare, 206; 17 Jur. 801; *Attorney-General v. Mayor of Wigan*, Kay, 268; 5 De G. M. & G. 52; 15 Jur. 299.

4 *Holkerstappe v. Saunders*, 6 Mod. 17.

5 *Lord Montague v. Dudman*, 2 Ves. S. 896.

6 2 Atk. 303.

7 2 Atk. 302; see *Lord Montague v. Dudman*, 2 Ves. S. 896; *Attorney-General v. Cleaver*, 18 Ves. 220.

tion of right was depending in Equity, it was but reasonable that the plaintiff should not proceed by action or indictment until it was determined there.

A Court of Equity has no jurisdiction to stay the process of a Court of Law, upon an award which has been made a rule of Court under the Stat. 9 & 10 Will. III. c. 15: the Court in which the submission is to be made a rule, alone having the power of reviewing the award.¹

An injunction will not lie to relieve the plaintiff against a judgment at Law, where the case in Equity proceeds upon a ground which was equally available at Law, unless the plaintiff can establish some special equitable ground for the relief which he asks. Accordingly, it has been held, that a plaintiff in Equity, who had pleaded a set-off in an action at Law and failed, could not sustain a bill for an account, relating to the same transaction as to which he had pleaded the set-off.² But if a defence could not have been made available in the Court of Law, at the same time, or under the circumstances, and there is no *laches* in the party applying, then relief will be granted, and the Court of Chancery will interfere by its injunction.³ So also, if a fact, material to the merits, which would render the proceedings upon the judgment inequitable, should be discovered after a trial, which could not, by ordinary diligence, have been ascertained before, relief will be granted.⁴ These, however, are mere exceptions to the general rule, that Equity will not relieve after a verdict where the defendant at Law might properly have defended himself there;⁵ or where there has been a mistake in the pleadings, or in the conduct of the cause;⁶ or merely to let in new corroborative evidence.⁷

1 *Gwinett v. Bannister*, 14 Ves. 530; *Dawson v. Sadler*, 1 S. & S. 537; *Nichols v. Roe*, 3 M. & K. 431, 433; overruling, 5 C. 5 81m. 155; see also *Heming v. Swinnerton*, 2 Phill. 79; *Davies v. Getty*, 1 S. & S. 411; *Pope v. Duncannon*, 9 81m. 177: 2 Jur. 173.

2 *Harrison v. Nettleship*, 2 M. & K. 423, 425; and see *Simpson v. Lord Howden*, 3 M. & C. 97; *Mellett v. Enequist*, 26 Beav. 466.

3 *Farguharson v. Pitcher*, 2 Russ. 81, 89.

4 *Jarvis v. Chandler*, T. & K. 319.

5 *Protheroe v. Forman*, 2 Swanst. 227; and see *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424; *Lord Red. 132*; *Taylor v. Sheppard*, 1 Y. & C. Ex. 271, 279; *Hankey v. Vernon*, 2 Cox. 12; *Issac v. Humpage*, 1 Ves. J. 427; 3 Bro. C. C. 463; *Bateman v. Willoe*, 1 Sch. & Lef. 205.

6 *Stephenson v. Wilson*, 2 Vern. 825; *Blackhall v. Combs*, 2 P. Wms. 70; *Kemp v. Mackrell*, 2 Ves. 8. 579; *Holworthy v. Mortlock*, 1 Cox, 141; *Great Western Railway Company v. Cripps*, 5 Hare, 91.

7 *Ware v. Horwood*, 14 Ves. 31; *Bullock v. Chapman*, 2 De G. & S. 211; 12 Jur. 738.

An important distinction has frequently been attempted to be drawn, between an error or mistake in fact, and an error or mistake in Law. With respect to the former, it has been clearly settled, that where a deed has been executed, or money paid, from ignorance of a fact, or under an erroneous impression respecting it, a Court of Equity will relieve; but there seems to have been some difference upon the question whether it would do so, when an act has been done under a mistake of law.¹ With regard to the cases on this head, in which relief has been given, some of them are attended with circumstances of fraud or circumvention, and others of them lie so much on the borders of the two kinds of errors, that they are to be classed amongst instances of errors of fact, rather than errors of law;² but, in *Pullen v. Ready*,³ Lord Hardwicke intimated, that, if parties are entering into an agreement, and have the facts before them, and their counsel choose to construe it, taking upon themselves the knowledge of the law, he would then hold them bound. Lord Eldon has quoted this passage with evident approbation; and, whatever may be the rule generally as to other parties, yet, in family arrangements, it seems to be settled that they will not be disturbed, after a long acquiescence, on the ground that they are founded on a mistake of the parties, or because, in the result, they may turn out to be more advantageous to one party than the other.⁴ We may, therefore, infer, from these cases, that an injunction will not be granted to stay any legal proceedings on the ground that the deed or instrument upon which an action was brought was made under a mistake in point of law,⁵ for *ignormantia juris non excusat*.⁶

Having now considered the several cases in which the Court will not interfere by injunction, the principal instances in which injunctions may be obtained will be mentioned.

1 *Pussy v. Desboursie*, 3 P. Wms. 316; *Broderick v. Broderick*, 1 P. Wms. 239; *Cocking v. Pratt*, 1 Ves. 8. 400; *Bingham v. Bingham*, *ib.* 126; *Ramaden v. Hylton*, 2 Ves. 8. 304.

2 See 3 M. & K. 99.

3 2 Atk. 591; cited 1 V. & B. 80.

4 See *Tweedell v. Tweedell*, T. & R. 1, 11; *Bellamy v. Sabine*, 2 Phill. 425; *Jenner v. Jenner*, 2 Giff. 232; 6 Jur. N. S. 668; 2 De G. F. & J. 359; 6 Jur. N. S. 1314; *Talbot v. Stanforth*, 1 J. & H. 484; 7 Jur. N. S. 961.

5 *Stockley v. Stockley*, 1 V. & B. 23; *Clifton v. Cockburn*, 3 M. & K. 76; *Neale v. Neale*, 1 Keen, 672, 682.

6 *Broom's Maxims*, 249, *et seq.*

It is a general rule, that wherever a party, by fraud, accident, mistake, or otherwise, has obtained an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained.¹ Thus, if by fraud, accident, or mistake, a deed is framed contrary to, or beyond the intention of the parties in their contract on the subject, and the forms of the Courts of Common Law will not admit of such an investigation as will enable them to do justice, the Court of Chancery will restrain the party from asserting his legal rights under the instrument in those points in which it is so framed, until the question has been investigated: when, if the complaint be well founded, it will either rectify the instrument in the points complained of, or permanently restrict the party from making use of it.² There are also many other cases in which the legal defence to a claim set up at Law rests, either exclusively or in a great degree, within the knowledge of the party advancing the claim; and as it is against conscience that the party should proceed in the assertion of his claim without communicating the information he possesses, it has become one of the modes of equitable interposition to afford relief, by injunction, until the discovery is obtained. Fraud, accident, mistake, and discovery, are, therefore, four of the principal grounds upon which injunctions may be applied for, to stay proceedings at Law. And it is to be observed, that an injunction to restrain proceedings at Law, when awarded, does not deny, but admit, the jurisdiction of the Courts of Common Law; and the ground upon which it issues is, that they are making use of their jurisdiction, contrary to equity and good conscience.³

The Court will relieve against an award made between partners in ignorance, on the part of the arbitrators and of the remaining partners, that important transactions had not been entered by the other, the managing partner, in the books of the firm, in consequence of which omission the award had been, to a corresponding amount too

¹ For a collection of cases as to the staying proceedings in other Courts, with forms of orders, see *Seton*, 874-882.

² *Lord Red.* 127; *Kden* on Inj. 4-14.

³ *Hill v. Turner*, 1 Atk. 515; and see *Sheffield v. Duchess of Buckinghamshire*, *ib.* 688.

favorable to such managing partner. An injunction to restrain proceedings on a judgment recovered at law upon an award alleged to have been made under these circumstances was continued to the hearing in a case, in which the ultimate success of the plaintiffs at the hearing, was not considered wholly free from question ; the amount of the judgment being ordered into Court.¹

A sale of the equity of redemption of certain mortgaged property had been effected under a power of sale contained in a second mortgage deed, and pending a suit in this Court to set aside such sale. The first mortgagee, who was one of the purchasers, was proceeding at law to recover against the mortgagor, upon the covenant contained in his mortgage deed, whereupon the mortgagor filed a supplemental bill to restrain proceedings at law. The first mortgagee, in his answer to the original bill insisted on the validity of the sale ; —from what had taken place, it was doubtful whether the mortgage debt was not extinguished in equity, as between the mortgagor and the mortgagee, and the original cause being almost ripe for hearing, an injunction was granted to restrain the action at law until the hearing took place.²

A mortgagor filed his bill alleging that nothing was due on the mortgage, and moved for an injunction to restrain execution in ejectment. The defendant set up a purchase and release of the equity of redemption, and alleged that except by means of this purchase the mortgage was not paid. The Court considered that the evidence shewed there was a fair case to try, as to the validity of the alleged purchase ; and granted an injunction on the plaintiff paying into Court \$200, and entering into the usual undertaking.³

The owner of land agreed to sell a portion thereof, and admitted the party into possession, who improved the premises and afterwards offered to sell his improvements back to his vendor, and for the purpose of ascertaining the amount to be paid, referred it to arbitrators who made an award, but its terms were never complied with, and the vendor afterwards brought an action of ejectment against the

1 *Wilson v. Richardson*, 2 Grant, 448.

2 *Rens v. Beckett*, 2 Grant, 650.

3 *Keating v. McKee*, 14 Grant, 608.

party in possession. The Court upon motion granted an *interim* injunction restraining the plaintiff in ejectment from executing a writ of possession.¹ The Canada Company through their agent, resident in Canada, contracted by letter to sell certain lands of the Company, upon the condition, amongst others, of the vendee building a saw mill thereupon, the vendee proceeded with the knowledge of the agent of the Company, to erect a saw mill, and construct a dam across a river, the effect of which was to overflow a large tract of land belonging to the Company. Subsequently the Company conveyed the lands contracted for, and which were situated on both sides of the river, across which the dam had been constructed reserving the bed of the river, and about thirty feet on either bank, the title to the bed of the river being then in the crown. Afterwards, the company having obtained a grant from the crown of the bed of the river, instituted proceedings at law against the persons owing the mill for the damage done by the overflowing of the river, and recovered a verdict for £500, and other actions were also brought for the same injury. Upon a bill filed for that purpose, the Court, at the hearing, decreed a perpetual injunction restraining the company from proceeding with the actions, and a conveyance of the bed of the river, and the portions on either side which had been reserved, and ordered the company to pay the costs.²

The plaintiff and defendant entered into an agreement, under which the defendant was to procure goods, or guarantee the payment of goods which were to be obtained, and sold by the plaintiff for their joint benefit, in certain proportions, and the plaintiff to secure and indemnify the defendant against all loss in respect thereof, executed a confession of judgment to be acted upon only in default of the plaintiff meeting the payment of such goods; the plaintiff made default, and defendant entered up judgment and sued out execution; the Court dissolved an injunction which had been issued, restraining proceedings upon the execution so issued although upon the construction of the agreement it was doubtful whether a partnership had not been created between the

¹ *Cook v. Smith*, 4 Grant, 441.

² *Brewster v. The Canada Company*, 4 Grant, 443.

parties; but the defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement to be levied upon, the Court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injunction should be continued in respect of that amount. (The Chancellor dissenting, who thought the injunction should be continued to the hearing.)¹ The solicitor of a mortgagee in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises; the decree, so pronounced, was subsequently set aside, and a decree *nisi* directed to be drawn up directing *inter alia*, a sale of the mortgaged premises, and that all judgment creditors should be served with the decree and made parties to the suit; notwithstanding this, however, the solicitor, who was also a judgment creditor of the mortgagor, proceeded upon his judgment and was about to sell the mortgaged premises under execution; the Court, upon a motion made in the cause, restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application.²

The plaintiff had subscribed a sum of money to aid in the erection of a parish church in the city of Toronto, with a view of raising such a sum as would enable the churchwardens to erect the church on the old site, so as to avoid leasing off portions of the land about the church used as a burying ground. Subsequently, at a meeting of the vestry, the plan of building was changed, by reason of which in making the excavations for the foundation of the church the graves of several members of the plaintiff's family were disturbed; thereupon, the plaintiff addressed to the vestry-clerk a letter annulling his subscription and refused to pay it. A suit having been instituted in the Division Court for the recovery of this subscription, a motion was made in this Court for an injunction to stay such action. The Court, under the circumstances, refused the application, with costs. *Quære*, whether this Court will in any case grant an injunction to restrain an action in the Division Court.³

¹ *Watt v. Foster*, 4 Grant, 548.

² *Goodwin v. Williams*, 5 Grant, 178.

³ *Heward v. Harrie*, 5 Grant, 220.

The owner of shares in a steamboat, on which a portion of the price was secured by the bond of the holder, sold the same, subject to this bond, and the shares were afterwards transferred in trust for the benefit of the original owner of the vessel, who still held the bond for securing the payment of the stock ; notwithstanding which proceedings were taken by him 'to enforce payment of the bond. Upon a bill, filed for that purpose, the Court restrained further proceedings thereon ; and ordered the bond to be delivered up to be cancelled, with costs.¹

The purchaser of saw-logs, to be delivered at certain specified times, assigned the contract to a third party, to whom the vendor delivered one year's supply of the logs. Afterwards, the original purchaser, becoming insolvent, absconded, and the vendor refused to complete the contract, asserting the right to stop the goods *in transitu*, or to retain them before the *transitus* commenced, in consequence of the insolvency of the purchaser. The assignee thereupon commenced an action at law in the name of the purchaser against the vendor, in which he recovered judgment, and the vendor filed a bill to restrain proceedings at law. The Court refused him any relief, and dismissed the bill with costs.² A defendant in an action at law, filed a bill in this Court to restrain proceedings, alleging, as grounds for relief, facts, which, if they had been properly pleaded, would have afforded a good defence at law. The Court, without enquiring as to the merits of the case, dismissed the bill. A party mis-pleading at law, is not thereby entitled to seek relief in a Court of Equity.³ Proceedings under a *fi. fa.* at law having been set aside, and an action brought against the Master, in whose name the *fi. fa.* had been sued out, an injunction was issued restraining proceedings. *Held*, the application for an injunction in the original cause in this Court was regular, and that the officer of this Court was the proper person to whom should be referred the question as to the amount of damage sustained by the proceedings which had been set aside.⁴ A creditor having proved his claim in the Master's office, afterwards proceeded to sell under a *fi. fa.* Upon

¹ *Thompson v. Wilkes*, 5 Grant, 594.

² *Wait v. Scott*, 6 Grant, 154.

³ *Morrison v. McLean*, 7 Grant, 167.

⁴ *Fisher v. Glass*, 9 Grant, 46.

the application of a co-defendant, the sale was restrained with costs.¹

A debtor while indebted to one creditor, and alleged to be insolvent, assigned a note to another creditor for a *bona fide* debt. Subsequently both creditors brought actions to recover their respective demands, but in order to enable one of them to obtain a first judgment, no defence was entered to his action, while the other action was defended. The Court, (following the decision of *Young v. Christie*, 7 Grant, 312), refused an injunction to restrain the first judgment creditor from enforcing the execution sued out on his judgment.² Although the plaintiffs had been guilty of great delay in applying to this Court for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an enquiry, the Court granted the writ on an interlocutory motion; the plaintiff's undertaking to proceed to an examination of witnesses within one month after answer filed, and hearing the cause forthwith thereafter, paying the costs at law incurred by reason of postponing the sale, and paying interest from the time the sale was to have taken place until the time of making a decree in the cause, in the event of the sale failing to realize enough to pay the full amount of the claim under the execution.³ A party to an action at law in coming into equity to obtain relief against a judgment therein and a stay of execution issued against him on such judgment, upon a statement of facts which, had they been proved, would have constituted a good defence to the action, is bound to establish that there are facts which, had they been proved in the action, would have formed a good defence; but at the time of such trial, and at the time he could, upon this disclosure, have obtained a new trial, he was ignorant of them, and could not with reasonable diligence have ascertained them. When a long time has elapsed since the party so applying did ascertain such facts, he is bound to make out as clear a case for an injunction as he would to obtain a decree to unravel the transactions which a Court of competent jurisdiction has, by its judgment, closed.⁴ This Court has no jurisdiction to restrain execution or other proceedings at law on a

¹ *Cahuac v. Durie*, 9 Grant, 485.

² *McKenna v. Smith*, 10 Grant, 40.

³ *Canada Permanent Building Society v. Bank of Upper Canada*, 10 Grant, 203.

⁴ *Cunningham v. Buchanan*, 10 Grant, 523.

legal demand upon a written instrument, on the ground that the defendant at law has a counter claim for unliquidated damages for the violation by the plaintiff at law, of covenants contained in the same instrument.¹ Where an agreement not under seal, was entered into by a mortgagee, who obtained from the mortgagor a deed of certain property; whereby the mortgagor was allowed to retain possession of a portion of the property, and the mortgagee the other portion, until he was paid; and such agreement having been destroyed by the mortgagee, and an action of ejectment brought on the deed; the Court restrained the mortgagee from enforcing his legal right.² An injunction may be granted against a plaintiff, at the instance of the defendant before decree.³

On an application for an injunction against an execution at law, the plaintiff in equity has not necessarily to satisfy the Court by evidence that the facts, if disputed, are as his bill and affidavits state; but only that there to a substantial equitable case which ought to be decided before execution goes. Where a party who is wrongfully sued at law comes into equity promptly, so that, by means of our system of circuits, his equitable case can be tried within a few weeks of the time when a legal defence would be triable at law, if he verifies his bill, shewing a good equitable case that is only triable in this Court, he can seldom be refused an injunction to restrain any execution going until the equitable questions are disposed of. There is no technical rule requiring the plaintiff's affidavit in support of a motion for an injunction to restrain any execution going until the equitable questions are disposed of. There is no technical rule requiring the plaintiff's affidavit in support of motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered. If a defendant at law is guilty of delay in instituting his-suit here this may not be a bar to his application for an injunction; but the Court, for the security of the plaintiff at law, may require the payment of the money into Court to abide the event; or may impose other terms which in case of a prompt application it might not be just or reasonable for the Court to exact. Or, the Court may, in the exercise of its discretion refuse the motion

¹ *Smith v. Wootten*, 12 Grant, 200.

² *Harris v. Meyers*, 7 U. C. L. J. 243.

³ *Stewart v. Kingemill*, 13 Grant, 247.

altogether, notwithstanding the *prima facie* case, which the plaintiff's bill and affidavits present in his favor; and, in view of this discretion, it may be expedient for the plaintiff in such a case to fortify his own affidavit with other evidence, which, in case of an earlier application might have been unnecessary. A defendant at law unnecessarily delayed filing his bill for an injunction until it was too late to have the equitable case it set up heard for six months; there were executions to a large amount out against his lands at the suit of other persons; and the defendant in equity swore, that, if delayed by an injunction, he believed he would probably lose his debt. This statement not being met by any counter affidavit, an injunction was refused except upon the terms of paying the money into Court.¹ A rule *nisi* in a County Court, for staying an execution on the ground that the execution had been satisfied, having been discharged was held to be no bar to an interlocutory injunction in this Court on the same ground.²

In these cases, the interference of a Court of Equity is founded upon strict equitable principles. Sometimes, however, the question between the parties depends partly upon a legal title and partly on an equity which will arise only in the event of that title being decided in one way. In such a case, the practice of the Court is, to require that the party applying to the Court for its interposition should admit the legal right of the other party; or, if circumstances are not such as to enable him to do that, then to allow the action to go on, but to restrain execution on the judgment, in order that the legal rights of the parties may be first ascertained, and that the plaintiff may then come to the Court to apply those legal rights.³

In cases resting upon purely equitable grounds, the injunction is not confined to any one point of the proceedings at Law; but, upon a proper case being presented to the Court, it may be granted at any stage of the action. Thus, an injunction is sometimes granted to stay trial;⁴ sometimes, when the parties are in a condition to enter up judgment, to restrain their so doing;⁵ and sometimes it is

1 *Treadwell v. Morris*, 15 Grant, 165.

2 *Bush v. Bush*, 15 Grant, 431.

3 *Barnard v. Wallis*, C. & P. 85, 90; *Hudson v. Temple*, 9 W. R. 243; not reported on this point, 29 Beav. 536; and see *Seton*, 875.

4 *Codd v. Wooden*, 8 Bro. C. C. 73; *Lady Arundell v. Phipps*, 10 Ves. 139, 144; *Rowe v. Wood*, 2 Swanst. 224, n. (a); *Holme v. Brown*, 9 Hare, App. 29; and see *Lloyd v. Adams*, 4 K. & J. 467.

5 *Turner v. Wright*, 1 J. & W. 290; *Williams v. Roberts*, 8 Hare, 815.

issued after a judgment, to stay execution, or proceedings under an execution.¹ The Court is, however, very cautious in interfering, when the application is made on the eve of the trial at Law;² and it is to be remembered that, after a judgment, an injunction will not be granted, except in those cases where there has been fraud or collusion in obtaining a verdict; or where the party has been unable to defend himself effectually at Law, without any fault or negligence of his own; or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage. In short, the Courts are unwilling to interfere, where it appears that the plaintiff has lain by until after a trial has taken place.³

It has been held in our Court that, where a special injunction is granted staying proceedings at Law, the amount claimed in the action at Law, must be paid into Court.⁴

A mortgage had been created by an absolute deed of conveyance with a bond of defeasance; a judgment was afterwards obtained against the mortgagee and an execution sent out against his lands: the Sheriff, under the writ so issued, had advertized, and was about to sell the mortgage property; upon a bill filed against the judgment creditor and the mortgagee, setting forth these facts, which were admitted by the defendants, the Court granted a special injunction restraining further proceedings under the writ.⁵ Where an action at Law had been brought by a Building Society against W. as surety for the Secretary of the Building Society; and W. filed a bill to restrain the action, founding his Equity on a resolution or minute alleged to have been passed or made by the Board of Directors in the following terms—"That Mr. W. had requested that his security for the Secretary might be cancelled. * * *

It was suggested also that Mr. R. W.'s name should be erased from

1 *Protheroe v. Forman*, 2 Swanst. 227, 234, n.; *Brooke v. Purton*, 1 Y. & C. C. C. 271, 274; 6 Jur. 94; *Williams v. Davies*, 2 Sim. 461.

2 *Seton*, 877, citing *Larmuth v. Simmons*, 11 Feb 1854, V. C. S.; and see *Holme v. Brown*, 9 Hare, App. 29; *Lloyd v. Adams*, 4 K. & J. 467.

Formerly a distinction existed between injunctions to restrain proceedings at law, and other injunctions; but this has been abolished; and see *Holme v. Brown*, 9 Hare, App. 29; *Fitzgerald v. Bull*, ib.; App. 65; *Sergison v. Bragan*, 16 Jur. 1111, V. C. S.; 9 Hare, App. 29 n.; *Senior Pritchard*, 16 Beav. 473; *Lorell v. Galloway*, 17 Beav. 1; *Mollitt v. Enequist*, 25 Beav. 600; 26 Beav. 468; *Harris v. Collett*, 26 Beav. 222; *Magnay v. Mines Royal*, 3 Drew. 130; 1 Jur. N. 153; *Lloyd v. Adams*, 4 K. & J. 467; *Fox v. Hill*, 2 De G. & J. 353; *Seton*, 877.

4 *Harrison v. Baby*, 1 Grant, 247.

5 *Neil v. Bank of Upper Canada*, 2 Grant, 336.

the said bond by wish of the board, *and both be relieved from securities.* Mr. T. was requested to submit two other names as securities in place of the two gentlemen named." The Court held that such a resolution afforded no ground for interfering with the action at Law.¹

The Courts of Common Law have now the power of compelling discovery, and adjudicating upon equitable defences;² but the concurrent jurisdiction of the Court of Chancery is not thereby abrogated.³ A party, however, who raises an equitable defence at Law, may be held to have elected to abide by the proceedings there, and to have abandoned his right to proceed in the Court of Chancery.⁴

An injunction until answer, or further order, may be granted to restrain proceedings in the Court of Probate, on the ground that a complete discovery cannot be obtained there.⁵

Although the Court of Chancery does not, in general, interfere with proceedings in the Court of Bankruptcy, which is a Court of Equity as well as of Law, and therefore capable of doing justice between the parties in matters of equity, yet, it seems, that it will interfere to restrain proceedings, the effect of which may be to afford a foundation for an adjudication in bankruptcy, in a case where such a proceeding would be contrary to equity.⁶

V. and D., traders, made an assignment to the plaintiffs on the 9th January, 1865, as insolvents, and in pursuance of the provisions of the Act of 1864. A judgment at Law having been obtained against V, his interest in the partnership assets was sold for a

1 *Whittemore v. Ridout*, 2 Grant, 525;

2 As to compelling discovery at law, see Common Law Procedure Act; *Chitty's Arch.* 1411, *et seq.*; and as to equitable defences at law, see same Act, ss. 83-86; *Chitty's Arch.* 252, *et seq.* As to writs of injunction at law, see *post*.

3 *Magday v. Mines Royal*, 3 Drew. 130; 1 Jur. N. S. 153; *Farebrother v. Welch*, 3 Drew. 122; *Gompertz v. Pooley*, 4 Drew. 443; 5 Jur. N. S. 261; *Phelps v. Prothero*, 7 De G. M. & G. 722; 2 Jur. N. S. 173; *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 100; 2 Jur. N. S. 311; *British Empire Shipping Company v. Simes*, 3 K. & J. 433; 3 Jur. N. S. 383; *Crosby v. European & American Company*, 1 J. & H. 108; 6 Jur. N. S. 1190; *Barry v. Crosby*, 2 J. & H. 130; *Walker v. Micklethwaite*, 1 Dr. & Sm. 49; *Thornton v. McKean*, 1 H. & M. 525, 529; *Stewart v. Great Western Railway Company*, 2 Dr. & Sm. 438; *Aff'd*, 2 De G. J. & S. 319; 11 Jur. N. S. 627.

4 *Terrill v. Higgs*, 1 De G. & J. 338; 4 Jur. N. S. 41; *Walker v. Micklethwaite*, *ubi sup*; and see *Evans v. Bremridge*, and *Stewart v. Great Western Railway Company*, *ubi sup*.

5 *Fuller v. Ingram*, 5 Jur. N. S. 510; 7 W. R. 302, V. C. W.

6 *Attwood v. Banks*, 2 Beav. 192, 200; *Perry v. Walker*, 1 Y. & C. C. 672; 6 Jur. 846; *Pim v. Wilson*, 2 Phil. 653, 656; and see *Thompson v. Derham*, 1 Hare, 35d, 371, 380; *Mather v. Lay*, 2 J. & H. 374.

nominal consideration to C, who had notice of the Insolvency proceedings, C, then entered into possession of, and otherwise interfered with the partnership goods, so as to hinder the plaintiffs from exercising the duties of their office; an injunction was therefore granted on application of the assignees to restrain the defendant from further interference.¹ By letters patent under the great seal issued on the 16th October, 1842, certain persons therein named were created a body corporate by the name of "Queen's College, at Kingston," with the style and privilege of a University, with power to appoint professors and other officers, and in case of complaint made to the trustees to institute enquiry, and in the event of any impropriety of conduct being duly proved, to admonish, reprove, suspend, or remove the person offending: *Held*, that the professorships in the institution were offices of freehold, and that the trustees had not the power at their discretion without such enquiry of removing the professors, but that they held their appointments *ad vitam, aut culpam*, that this Court would by injunction prevent the trustees from improperly interfering with the professors in the discharge of their duties, and where a professor had been improperly removed, the Court, on decreeing him relief, and in order to do him complete justice, ordered him to be paid out of the trust funds of the institution his arrears of salary; and ordered such of the trustees as had acted in such improper removal to pay the costs of the suit.²

With regard to foreign Courts, there has been much doubt and difference of opinion. Soon after the Restoration, when the Court of Chancery was in its infancy, Lord Clarendon refused an injunction to restrain proceedings at Leghorn, after advising with the other Judges; but the reporter adds, "*sed quære*, for all the bar was of another opinion."³ This case has not been recognized or followed in later times; and several authorities may be found where decrees and orders have been made to restrain defendants from carrying on proceedings under such actions, in Ireland,⁴ Scotland,⁵

1 *Wilson v. Corby*, 11 Grant, 92.

2 *Weir v. Mathieson*, 11 Grant, 383.

3 *Love v. Baker*, 1 Ch. Ca. 67; S. C. *nom. Lowe v. Baker*, Freem. 125.

4 *Clarke v. Ormonde*, Jac. 646; *Booth v. Leicester*, 1 Keen, 579; *Harrison v. Gurney*, 2 J. & W. 543.

5 *Kennedy v. Gasillia*, 2 Swanst. 318, 323; see *Wharton v. May*, 5 Ves. 27, 71; *Bushby v. Munday*, 5 Madd. 297, 306; *Marquess of Breadalbane v. Marquess of Chandos*, 2 M. & C. 711, 728; *Jones v. Geddes*, 1 Phil. 724; *Venning v. Loyd*, 1 De G. F. & J. 183; 6 Jur. N. S. 81; *Marquis of Dute v. Stuart*, 2 Giff. 582; 7 Jur. N. S. 355; S. C. *nom. Stuart v. Moore*, *ib.* 1129; 4 Mac. H. L. 1.

Demerara, and other countries.¹ In granting such an injunction, however, the Court does not presume to direct or control the foreign Courts; but, without respect to the subject-matter of dispute, it considers the equities between the parties, and decrees *in personam*, according to those equities. The jurisdiction is not grounded upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the party, upon whom the order is made, being within the power of the Court: for, if the Court can decree the performance of an agreement touching the boundary of a province in North America,² or can foreclose a mortgage in the Channel Islands,³ in like manner it can restrain the party, being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, of the instituting or prosecuting of an action in a foreign Court.⁴ And if a defendant, who is thus ordered to discontinue a proceeding which he has commenced against the plaintiff in a foreign Court, should think fit to disobey the order, and continue the prosecution of such proceedings, the Court of Chancery, although it does not pretend to control or intermeddle with the independent jurisdiction which the other Court undoubtedly possesses will act upon the person of the defendant, by punishing him for his contempt; and if he should continue contumacious, and ultimately obtain a judgment in the other Court, it will protect the plaintiff here against the consequences of that judgment.⁵ In this view of the case, as the doctrine is now established, the only question is, whether the ends of justice require that the Court of Chancery should interfere. This must depend upon special circumstances: such as, that the Court of Chancery has better means of determining both the law and the facts of the case;⁶ or that two suits have been instituted for the same matter in all respects, and there has been a decree and adjudication in this country; or that there are questions in the cause, which must be decided according to the principles of equity, before it can appear whether the parties have a

¹ *Bunbury v. Bunbury*, 1 Beav. 318, 331; *Bockford v. Kemble*, 1 S. & S. 7, 15; and see *Price v. Deschurst*, 4 M. & C. 76. 79; 8 Sim. 279; *Coed v. Coed*, 33 Beav. 314; 9 Jur. N. S. 1855.

² *Penn v. Lord Baltimore*. 1 Ves. S. 444.

³ *Toller v. Carteret*, 2 Vern. 494.

⁴ *Lord Portarlington v. Souby*, 3 M. & K. 104, 108.

⁵ *Bushby v. Munday*, 5 Madd. 297, 307.

⁶ *Ibid.*; *Jones v. Geddes*, 1 Phill. 724.

clear equitable, as well as legal title, to the rights which they claim abroad.¹

An injunction will also be granted to prevent waste, or anything in the nature of waste. The inadequacy of the remedy at Common Law, for waste, is so unquestionable that a resort to the Courts of Law, for this purpose has in a great measure fallen into disuse. The remedy by a bill in equity is much more easy, expeditious, and complete: for relief will be given in equity where the remedies provided in the Courts of Common Law could not be made to apply:² as where the titles of the parties are of a purely equitable nature; or where the parties have both legal titles and legal remedies, but irreparable mischief would be done, unless they were entitled to more complete relief than that which they could obtain at law; or where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing those legal rights to the injury of those in remainder.³

The most ordinary instance of the interposition of a Court of Equity, is by injunction to restrain the commission of waste by a tenant for life or years, upon the application of the reversioner or remainder-man: for an estate for life is always impeachable for waste, unless the contrary is expressly provided.⁴ Injunctions also will be granted to protect the interests of a child *in ventre sa mere*;⁵ of a remainder-man, whether vested,⁶ or contingent,⁷ or of an executory devisee,⁸ or of a tenant in common, if the co-tenant in possession is doing that which is destructive to the property.⁹ And not only will the Court of Chancery grant the injunction upon the

1 *Booth v. Leycester*, 1 Keen, 579; 3 M. & C. 459; see also *Lord Portarlington v. Soulby*, 3 M. & K. 104; *Wedderburn v. Wedderburn*, 4 M. & C. 585, 594; *Jones v. Geddes*, 1 Phill. 724; *Henderson v. Henderson*, 3 Hare, 100, 110; *Pennell v. Roy*, 3 De G. M. & G. 126; 17 Jur. 247; *Cood v. Cood*, 33 Beav. 314; 9 Jur. N. S. 1335.

2 As to effect of laches in cases of waste, see *Attorney-General v. Kastlake*, 11 Hare, 205. 17 Jur. 301.

3 As to waste, see *Add. Wrongs*, 118; L. C. Conv. 90-97; 1 L. C. Eq. 559-624; 2 *Spence Eq. Jur.* 570; *Story Eq. Jur.* s. 515; *Woodfall*, 481; and for a collection of cases as to waste, with forms of orders for injunctions see *Seton*, 890-897.

4 *Colo v. Peyson*, 1 Chan. Rep. 106. An injunction may be granted, although the tenant holds under a lease renewable forever: *Coppinger v. Gubbins*, 3 J. & Lat. 397.

5 *Robinson v. Litton* 3 Atk. 211; *Lutterell's Case*, cited Prec. in Ch. 50.

6 *Roswell's Case*, 1 Rolle Ab. 377; *Tracy v. Tracy*, 1 Vern. 23; *Abraham v. Bubb*, Freeman. 33.

7 *Garth v. Cotton*, 1 Dick. 163, 708; *Bagot v. Bagot*, 32 Beav. 509; 9 Jur. N. S. 102.

8 *Williams v. Duke of Bolton*, 3 P. Wms. 268, n. (1).

9 *Hayward v. Stillingleet*, 1 Atk. 422, 425; *Robinson v. Litton*, *ubi sup.*; and see *Stimfeld v. Habergham*, 10 Ves. 278.

9 *Arthur v. Lamb*, 2 Dr. & Sm. 423.

application of the remainder-man in fee, but it will also grant it upon the application of the *mesne* remainder-man for life: for though he has no right to the timber, which belongs to the owner of the inheritance,¹ yet, if the first tenant for life should die, he would have an interest in the mast and shade.² Upon the like principle, also an injunction will be granted at the suit of ground landlord, to stay waste by an under-lessee:³ and an injunction has also been obtained against a tenant from year to year, after a notice to quit, to restrain him from taking away the crops, or sowing the land with a pernicious seed, in a manner which was contrary to the usual course of husbandry.⁴

A Court of Equity will also restrain waste where the titles of the parties are equitable: thus, in the case of mortgages, if the mortgagor in possession should attempt to cut down timber and the land without the timber is an insufficient or scanty security, a Court of Equity will restrain him: for, as the whole estate is a security for the money advanced, the mortgagor, under such circumstances, ought not to be suffered to lessen or diminish it.⁵ And so it is the duty of trustees to protect the entire inheritance for the benefit of all the *cestui que trustent* in remainder whether vested or contingent; and as, in many instances, the value of that inheritance consists as much of the mines and timber as it does of the land, they may, by force of their trust, have their remedy by injunction, to prevent the destruction of the one, or the exhaustion of the other.⁶ Under this head, we may also class those cases where persons are contracting for leases and other interests in property, which they are only in possession of by virtue of the contract: in such cases, if the plaintiff has no legal title, he has no redress at law; but if he has such a contract as will authorize him to call upon the Court to clothe his possession with the legal title, the injunction will be granted.⁷

1 *Lushington v. Boldero*, 15 Beav. 1; and see *Bagot v. Bagot*, *ubi sup.*

2 *Dayrell v. Champness*, 1 E. Ca. Ab. 400, pl. 4; *Mollineaux v. Powell*, 3 P. Wms. 268, n. (F); *Perrot v. Perrot*, 3 Atk. 94; *Davis v. Leo*, 6 Ves. 787.

3 *Farrant v. Lovell*, 3 Atk. 723; S. C. nom. *Farrant v. Lee*, Amb. 105.

4 *Onslow v. —*, 16 Ves. 173; *Pratt v. Brett*, 2 Madd. 62; and see *Duke of St. Albans v. Skipwith*, 8 Beav. 354.

5 *Usborne v. Usborne*, 1 Dick. 75; *Wright v. Attyne*, 1 V. & B. 313, 314; *Hippesley v. Spencer*, 5 Madd. 422; *Huaghreys v. Harrison*, 1 J. & W. 531; *Goodman v. Kine*, 3 Beav. 379; and see *King v. Smith*, 2 Haro. 239; 7 Jac. 694.

6 *Garth v. Cotton*, 1 Dick. 183; *Stanfield v. Habergham*, 10 Ves. 273, 279; *Pugh v. Vaughan*, 12 Beav. 517.

7 *Norway v. Rose*, 19 Ves. 154, 155.

The mortgagee of a term of years being in possession of the mortgaged estate, will, at the suit of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises, although the mortgagee may have obtained the consent of the reversioner to what he is doing.¹ A mortgage having been created on land on which was erected a steam saw-mill, the mortgagor was restrained from removing the machinery out of the mill; although it was alleged that the property would still remain a sufficient security, as the effect of such removal would have him to change the nature and character of the mortgaged premises.² Although the general principle is that one joint tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate.³ The plaintiff, a mortgagee, filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The Court thought that the building, having been actually removed, it was a proper case for a mandatory injunction, but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case.⁴

An injunction will also be granted, in some cases, where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more complete relief than that which they would obtain at Law. It has accordingly been granted, where the injunction amounted in fact to an injunction to stop a trespass: for, if the Court would not interfere against a trespasser, he might go on by repeated acts of damage, which would be absolutely irremediable.⁵ The original distinction was, that if a person still living committed a trespass, by cutting timber, or taking lead ore, or digging for coal, the Court would not interfere, except so far as to give a discovery, and then an action might be brought for the value discovered; but if the

¹ *Chisholm v. Sheldon*, 1 Grant, 318.

³ *Lassert v. Salyards*, 17 Grant, 109.

⁵ *Deere v. Guest*, 1 M. & C. 516; *Greenhalgh v. Manchester & Birmingham Railway Company*, 3 M. & C. 784; *Fooks v. Wilts Railway Company*, 5 Hare, 199; *East Lancashire Railway Company v. Hattersley*, 8 Hare, 73, 87; *Webster v. South Eastern Railway Company*, 1 Sim. N. S. 272; 15 Jur. 73. As to trespass upon real property, see *Add. Wrongs*, 220, *et seq.*; and for a collection of cases in Equity, see *Seton*, 897.

² *Gordon v. Johnston*, 14 Grant, 402.

⁴ *Meyers v. Smith*, 15 Grant, 616.

person died, then, since the trespass died with him, the Court has said it would decree an account, though the law provided no remedy. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was thus acknowledged.¹ Lord Thurlow himself acted upon the same principle: saying, that the person to be enjoined was a mere stranger, and he ought to be turned out of possession immediately.² In *Flamang's* case,³ a landlord of two adjoining closes let one of them to a tenant who took coal out of one close, and also out of the other which was not demised to him; and it was held, at first, that the taking the coal out of the former as waste, would be restrained, but as to the close which was not demised to him, it was a mere trespass, and the Court could not interfere; but Lord Thurlow afterwards changed his opinion, on the ground that irreparable mischief would follow his refusal: holding, in effect, that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not the only remedy to which in equity he was entitled.

The same principle has been acted on, and applied, in various other cases;⁴ and the grounds on which the Court acts in cases of this nature, appear to be as follows:—Where the defendant is in possession, and the plaintiff, claiming possession, seeks to restrain him from committing acts of trespass or waste, the Court will not interfere,⁵ unless the acts are such flagrant acts of spoliation as to justify it in departing from the general principle;⁶ where the plaintiff is in possession, and the person committing the acts complained of is an utter stranger, not claiming under the colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law: though, where the acts tend to the destruction of the estate, the Court will grant it.⁷ But where the person in possession seeks to re-

¹ *Thomas v. Oakley*, 18 Ves. 186.

² *Mortimer v. Cottrell*, 2 Cox, 205.

³ Cited or referred to in 6 Ves. 147; 7 Ves. 308; 15 Ves. 138; 18 Ves. 186.

⁴ See judgment of V. C. Kindersley in *Louisa v. Bettle*, 10 Jur. N. S. 226; 12 W. R. 899. As to an inspection in such cases, see *Whaley v. Brancker*, 12 W. R. 670, 605, V. C. K.

⁵ *Hamilton v. Worresfold*, cited 10 Ves. 200. n. (c); *Pillsworth v. Hopton*, 6 Ves. 51; *Crockford v. Alexander*, 15 Ves. 138; *Jones v. Jones*, 3 Mer. 161; *Haigh v. Jagger*, 2 Coll. 231; *Davenport v. Davenport*, 7 Hare, 217.

⁶ *Earl Talbot v. Hope Scott*, 4 K. & J. 96; 4 Jur. N. S. 1172; *Neale v. Cripps*, 4 K. & J. 472.

⁷ *Mogg v. Mogg*, 2 Dick. 670; *Mortimer v. Cottrell*, 2 Cox, 205; *Mitchell v. Dora*, 6 Ves. 147; *Earl Cowper v. Baker*, 17 Ves. 128; *Courthope v. Mappledden*, 10 Ves. 290; *Best v. Drake*, 11 Hare, 369.

strain one who claims by adverse title, then the tendency will be to grant the injunction : at least where the acts alone either do or might tend to the destruction of the estate.¹

The plaintiff contracted with two of the defendants, for the manufacture by them, of five-thousand saw logs, to be delivered at the mouth of the river Trent, for which he was to pay partly by instalments, during the progress of the work, and the residue when the logs should be delivered at the place designated; and at the same time, or immediately afterwards, it was verbally arranged that the logs, as they were manufactured, should be marked with the plaintiff's initials, and should be delivered to him as a security for his advances, without prejudice to the agreement for their being conveyed to the mouth of the river. The stipulated advances were duly made, and the logs, as manufactured, were marked with the plaintiff's initials, but not otherwise delivered to him. *Held*, that the manufacturers could not afterwards dispose of these logs, to the prejudice of the plaintiff; and having attempted so to do, by selling and delivering them to a third person for value, but who had notice of the plaintiff's claim, an injunction was granted to prevent their removal by such person.² In a suit by the original owner of land and his vendee, (to whom no conveyance had been made) the Court upheld an injunction restraining an occupant of the land, and a person to whom such occupant had contracted to sell the timber on the lot, from cutting down the timber, such occupant having gone into possession under the owner; though it did not appear that such timber was of any peculiar value to the plaintiff, and though the affidavits were contradictory, as to occupant having had authority from the owner to sell the timber.³ An *ex parte* injunction had been granted to restrain the defendants until further order from interfering with certain saw logs in the Salmon river, and which the plaintiff claimed as his, the defendant having notwithstanding obtained possession of the logs; a motion to extend the injunction so that, in effect the plaintiff might recover possession of the logs from the defendants was retained until after issues should be tried as to the

¹ *Anon.*, cited in *Mogg v. Mogg*, 2 Dick. 670; 7 *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Grey v. Duke of Northumberland*, 13 Ves. 236; *Kinder v. Jones*, 17 Ves. 110; *Thomas v. Oakley*, 18 Ves. 184; *Loundes v. Bettie*, 10 Jur. N. S. 226; *contra*, *Smith v. Collyer*, 8 Ves. 89.

² *Fuller v. Richmond*, 2 Grant, 24.

³ *Lawrence v. Judge*, 2 Grant, 301.

plaintiff's property in the logs, this being disputed by the defendants.²

"Saw logs cannot be intended *prima facie*, to be of "peculiar value" without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief however, must be applied for promptly.²

A purchaser having entered into possession under his contract, and failing to perform his agreement, and to meet his payments after the time appointed for that purpose had arrived, was restrained from committing waste, or removing timber already cut down upon the premises in question.³ No injunctions will be granted between tenants in common, except in cases of actual destruction. *Semble*, but where a tenant in common of one moiety was trustee of the other under a will, and was felling timber for his own benefit, in breach of his trust, he was enjoined from doing so, it being considered that his right of ownership in his own moiety were to be exercised in subordination to his duty as trustee of the other moiety.⁴ Where a strip of land was vested in the plaintiff, (according to the report of commissioners appointed to run a line between two townships), but the defendant claimed the property, and had applied to the Court of Queen's Bench to quash the report, pursuant to the statute appointing the commissioners, pending the application the defendant commenced to fell timber, alleged to be of a valuable description, growing on the strip. The Court granted an injunction to restrain such felling, until a decision of the motion pending before the Court of Queen's Bench.⁵ The Court will restrain the attaching creditors of an absconding defendant from selling timber improperly cut upon land mortgaged by the defendant to the plaintiff.⁶ The injunction was granted in this case, on the principle that the timber in question formed part of the security, and was specifically liable to the satisfaction of the plaintiff's claim; and that the attaching creditors

1 *Farewell v. Wallbridge*, 2 Grant, 332.

2 *Flint v. Corby*, 4 Grant, 45.

3 *Ferrier v. Kerr*, 2 Grant, 668.

4 *Christie v. Saunders*, 2 Grant, 670; but see *Cougall v. Foster*, post, p. 1658.

5 *Christie v. Long*, 3 Grant, 630.

6 *Thompson v. Crocker*, 3 Grant, 663.

stood in no better situation than the defendant Crocker himself, who could not have been permitted by such an unauthorised act to convert the plaintiff's specific lien into a mere personal remedy. One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property.—*Esten, V. C.*, dissenting.¹

On the agreement for sale of a steamboat, the vendor delivered possession to the vendee, and executed a covenant binding himself to transfer the vessel with her machinery and furniture to the purchaser absolutely, upon payment of the balance of purchase money by certain instalments. And if default were made in payment of any portion thereof, it was provided that the vendor should be at liberty to resume possession of the vessel, with her machinery and furniture. The Court granted an injunction, restraining the purchaser from removing the machinery from the vessel, so long as any part of the purchase money remained unpaid.²

Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing and repairs upon the mortgaged premises, he will be restrained from felling trees for other purposes, if it does not clearly appear that the property, notwithstanding the removal of the timber, will remain of sufficient cash value to satisfy the mortgage debt.³

Although the general rule is, that the mere fact of a tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the Court will not, in such a case, interfere with the dealing of such co-tenant in regard to the property; still, where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the Court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof unless they undertook to bring into Court one-third of such proceeds; but refused to interfere with the possession of the mother

¹ *Dougall v. Foster*, 4 Grant, 319.

² *Laughton v. Thompson*, 7 Grant, 30.

³ *Russ v. Mills*, 7 Grant, 146.

and her husband in respect of previous years ; although as to such previous years the mother might have been accountable to her infant children as trustee for them.¹ Where a father in a special contract applies the funds derived from such contract to other contracts not belonging to such special contract, an injunction will be granted against him until the partnership be wound up, although such injunction may not have been prayed for in the original bill.² After a decree of foreclosure, if the mortgagor commits waste, the Court will enjoin him, though an injunction may not have been prayed for in the bill.³

Where a mortgagor in possession was felling timber on the mortgaged premises, the Court, at the instance of a judgment creditor of the mortgagor with an execution against lands in the hands of the sheriff, granted an injunction to restrain future cutting by the mortgagor, his servants, agents and workmen, it being shown that the property was a scanty security for the claims of the mortgagees and the amount due to the execution creditor.⁴

The Court will likewise interfere by injunction, where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing their legal rights to the injury of those in remainder. This is commonly called equitable waste, which may be defined to be, the commission of such acts as at Law would not be esteemed, under the circumstances of the case, to be waste, but which are so esteemed in the view of a Court of Equity from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.⁵ Thus, for example, it was held, in *Lewis Boule's* case,⁶ that if there was a tenant for life, without impeachment of waste, he had as great a power to do waste, and to convert it at his own pleasure, as a tenant in fee or a tenant in tail had : so that, if any trees were severed from the inheritance, either by the act of the party or by the act of law, and became chattels, the whole property in them was in the tenant for life, by force of the clause. The necessary consequence of this

¹ *Bates v. Martin*, 12 Grant, 490.

³ *Cawthra v. McGuire*, 5 U. C. L. J. 142.

⁵ As to equitable waste, see *ante*.

² *Thibodo v. Seobell*, 5 U. C. L. J. 117.

⁴ *Wason v. Carpenter*, 13 Grant, 329.

⁶ 11 Rep. 80.

doctrine was, that a tenant for life without impeachment of waste, could not in any case be restrained, in Equity, from cutting timber upon the estate: for that would have been to determine that he should not enjoy the property which the law gave him.¹ It was, however, soon found, that this extensive power might be wantonly and capriciously abused, to the prejudice of the inheritance; and, accordingly, where a tenant for life, unimpeachable of waste, was making an unconscientious use of that power, the Court of Chancery assumed the jurisdiction of restraining and modelling it. Thus, it has interfered by injunction, where the tenant for life was pulling down a castle;² or the family mansion, or farm-houses.³ It will also interfere, where he is cutting down timber of too young growth;⁴ or where he is cutting down trees which were planted or growing, or designedly left, for ornament or shelter.⁵ This principle has even been extended to plantations, vistas, avenues, and rides;⁶ and to trees which are either planted to shut out an object,⁷ or merely for the benefit of a view.⁸ In some of these cases, the kind of waste has been called, by the Judges, extravagant, humoursome waste: in others voluntary, malicious, intended waste: in others again, wanton and wilful waste. In all of them, in short, it was the improper and abusive exercise of a legal power, to the detriment of those in remainder, which the Court interfered to restrain; it will not interfere in any case of permissive waste.⁹

Tenants in tail after the possibility of issue extinct, have the same powers, and are subject to the same restrictions, as tenants for life without impeachment of waste; and it makes no difference that they are unimpeachable of waste, not by the provision of the grantor, but as a legal incident to their estate.¹⁰

1 *Aston v. Aston*, 1 Ves. S. 264, 266.

2 *Vane v. Lord Bernard*, 2 Vern. 738; S. C. nom. *Lord Bernard's Case*, Prec. in Ch. 454.

3 *Aston v. Aston*, *ubi sup.*; *Smyth v. Carter*, 18 Beav. 78.

4 *Obrien v. Obrien*, Amb. 107; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; and see Order in S. C. *Seton* 890; *Strathmore v. Bowes*, 2 Bro. C. C. 88; *Turner v. Wright*, Johns. 740; 6 Jur. N. S. 647; 2 De G. F. & J. 234; 6 Jur. N. S. 809.

5 *Packington's Case*, 3 Atk. 215; *Williams v. McNamara*, 8 Ves. 70; *Stansfeld v. Habergham*, 10 Ves. 273; *Wellesley v. Wellesley*, 6 Sim. 497; *Morris v. Morris*, 15 Sim. 505; *Kekewich v. Marker*, 3 McN. & G. 311; 822; *Marker v. Marker*, 9 Haro. 1; *Campbell v. Allgood*, 17 Beav. 623; *Vincent v. Spicer*, 22 Beav. 330; 2 N. S. 654; *Micklethwait v. Micklethwait*, 1 De G. & J. 504; 3 Jur. N. S. 1279; *Hallivell v. Phillipps*, 4 Jur. N. S. 607; 6 W. R. 408, V. C. W.; *Turner v. Wright*, *ubi sup.*; *Ford v. Tyndal*, 10 Jur. N. S. 429, L.J.J. For forms of order, see *Seton*, 890-894.

6 *Lord Tanworth v. Lord Ferrers*, 6 Ves. 419.

7 *Day v. Merry*, 16 Ves. 375.

8 *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

9 *Pouys v. Blagrove*, 4 De G. M. & G. 448, 458; *Kay*, 495; 18 Jur. 462.

10 *Abraham v. Bubb*, Freem. 53; *Attorney-General v. Duke of Marlborough*, 3 Madd. 496, 539; *Williams v. Williams*, 15 Ves. 419, 423; and see 2 Swanst. 145, n.

It is to be remarked, that the object of the Court's interference in granting an injunction to stay this kind of waste is not by way of satisfying a damage, but in order to prevent a wrong; and, therefore, a person cannot come into Equity merely for an account, unless where the waste is of that nature that the plaintiff has no remedy at law. The account depends entirely upon the injunction: it is incidental to, and consequential upon it; and, if a person is entitled to the one, he is entitled to the other also, on the principle of preventing a multiplicity of suits: for, otherwise, he would be obliged to bring his action at Law as well as his bill in Equity: his action by way of satisfaction: his bill by way of prevention.¹ After the determination of the tenant's estate, a bill will lie for an account of equitable waste, although no injunction is prayed by the bill;² and if the person who has committed the waste is dead, he must, through his representatives, refund in respect of the wrong he has done, and not retain the produce of his injury: which is recoverable in no other Court. "It would," says Lord Cowper,³ "be a reproach to Equity to say, when a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that, in this case, I must be without remedy."

The Court will interfere, by injunction, to suppress the commission or continuance of a nuisance.⁴ Nuisances are of two kinds: those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.

With regard to nuisances, the jurisdiction seems to be of very ancient date, and to be founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. The jurisdiction is applicable, not only to nuisances strictly so called, but also to *purprestures*. By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, forts, or streets; and the difference between *purprestures* and nuisances

¹ *Jesus College v. Bloom*, 3 Atk. 263; Amb. 54; *Duke of Leeds v. Lord Amherst*, 14 Sim. 357, 364; 20 Beav. 229; 2 Phill. 117, 122; *Lushington v. Boldero*, 15 Beav. 1.

² *Garth v. Cotton*, 1 Dick. 183; *Smith v. Cooke*, 3 Atk. 381; *Pulteney v. Warren*, 6 Ves. 89; *Grierson v. Eyre*, 9 Ves. 346.

³ *Bishop of Winchester v. Knight*, 1 P. Wms. 406, 407; and see *Humbly v. Trott*, Cowp. 371, 376; *Marquis of Lansdowne v. Marchioness Dowager of Lansdowne*, 1 Wadd. 116, 136.

⁴ As to nuisances, see *Add. Wrongs*, 74, 838; *Broom Com. Law*, 1029; *Woodfall*, 733, 1063; and for a collection of cases in Equity, see *Seton*, 393-900; and see *ib.* 894.

consists in this: that where the *jus privatum* of the Crown is invaded, it is a *purpresture*; but where the *jus publicum* is violated, it is a nuisance.¹

In cases of *purpresture*, the remedy is either by information for an intrusion at the Common Law, or by information in Equity at the suit of the Attorney-General: the consequence of a judgment at Common Law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance; whilst, upon an information in equity, where the trespass does not produce any public injury, the Court may direct an inquiry whether it is most beneficial to the Crown to abate the *purpresture*, or to suffer the erection to remain, and be assessed as a part of the legal revenue.²

There are many cases in which the Court will interfere by injunction to maintain things *in statu quo*, *pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful; provided the Court sees that there is a substantial question to be settled. But the Court does not interfere by special injunction against a party in possession claiming adversely to the plaintiff: nor, on the other hand, will the Court, as a general rule, so interfere in *favour* of a party in possession, to restrain a casual trespass.³

In cases of public nuisance, properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in equity to stop the mischief, and to restrain the continuance of it.⁴ It is necessary, however, that the nuisance should be actual and existing, and not merely prospective, however strongly the apprehension of injury may be supported by scientific evidence.⁵

As a general rule, a suit of this kind should be instituted by the Attorney-General, or, at all events, he should be a party to it, as representing the public; but persons who conceive themselves

¹ 2nd Inst. 38, 272; *Harg. Law Tracts*, 84, 87.

² *Attorney-General v. Richards*, 2 Anst. 603, 616; *Attorney-General v. Johnson*, 2 J. Wil. 87; *Rees v. Earl Grosvenor*, 2 Starkie's N. P. 511.

³ *The Attorney-General v. McLauchlin*, 1 Grant. 34.

⁴ *Mayor of London v. Bolt*, 5 Ves. 129; *Attorney-General v. Nichol*, 16 Ves. 338; *Attorney-General v. Forbes*, 2 M. & C. 123, 129; *Turner v. Blamire*, 1 Drew. 402.

⁵ *Attorney-General v. Mayor, &c., of Kingston-on-Thames*, 11 Jur. N. S. 596; 13 W. R. 586, V.C.W.

aggrieved may also come forward, and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained damage;¹ and in the event of an individual suffering peculiar and special damage by a public nuisance, a suit may be sustained by him, without making the Attorney-General a party.²

Where the Town Council of one of the towns mentioned in the schedule to the Provincial Statute, 12 Vic., ch. 81, were about proceeding to open a street without having first obtained the permission required by the statute of certain parties owning houses on the land over which the intended street would pass, the Court granted an injunction to restrain the opening of such intended street, upon a bill filed by a party whose land lay on the line of the intended street, although no house stood upon the plaintiff's land, and his premises were not within the exception contained in the proviso to the 60th clause of the Act.³

With regard to private nuisances, the Court will interfere by way of injunction where the mischief is irreparable. The general ground of its interference is that sort of material injury to property or health requiring the application to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at Law.⁴ It is not every case that would furnish a right of action against a party which would justify the interposition of the Court of Equity to redress the mischief or remove the annoyance. But there must be such an injury, or the apprehension of it, as from its nature is not susceptible of being adequately compensated for by damages; or such as, from its long continuance, occasions a constantly recurring grievance which cannot be otherwise prevented but by an injunction.⁵ Thus, it has been said, that every common

1 *Buines v. Baker*, Amb. 155; *Attorney-General v. Cleaver*, 18 Ves. 211; *Spencer v. London & Birmingham Railway Company*, 8 Sim. 193; *Simpson v. Smith*, ib. 212; *Attorney-General v. Forbes*, 2 M. & C. 123; *Lee v. Milner*, 2 Y. & C. Ex. 611; *Elmhirst v. Spencer*, 2 McN. & G. 46; *Mayor, &c., of Liverpool v. Chorley Waterworks Company*, 2 De G. M. & G. 852; *Attorney-General v. Corporation of Birmingham*, 4 K. & J. 523; *Attorney-General v. United Kingdom Electric Telegraph Company*, 30 Beav. 287; 8 Jur. N. S. 583.

2 *Soltau v. De Held*, 2 Sim. N. S. 133, 142; 16 Jur. 326; *Wood v. Sutcliffe*, ib. 163; 16 Jur. 75.

3 *Wilson v. Town Council of Port Hope*, 2 Grant, 370.

4 *Attorney-General v. Nichol*, 16 Ves. 338, 343; *White v. Cohen*, 1 Drew. 312.

5 *Fishmongers' Company v. East India Company*, 1 Dick. 163; *Attorney-General v. Nichol*, 16 Ves. 333, 342; *Haines v. Taylor*, 10 Beav. 75; 2 Phill. 209; *Elmhirst v. Spencer*, 2 McN. & G. 46; *Attorney-General v. Sheffield Gas Consumers Company*, 3 De G. M. & G. 304; 17 Jur. 677; *Soltau v. De Held*, 2 Sim. N. S. 143, 16 Jur. 326; and *Wood v. Sutcliffe*, ib. 163, 16 Jur. 75; *Imperial Gas Company v. Broadbent*, 7 H. L. Ca. 600; 5 Jur. N. S. 1319; S. C. nom. *Broadbent v. Imperial Gas Company*, 17 De G. M. & G. 436; 3 Jur. N. S. 221.

trespass, or a mere diminution of the value of the premises, is not a ground for an injunction: but, if the trespass continue so long as to become a nuisance, or if the diminution of the value of the premises amount to irreparable mischief, then the Court will undoubtedly interfere.¹ The most common cases in which the Court exercises this jurisdiction occur, where it is called upon to restrain a party from building so near the plaintiff's house as to darken his ancient lights.² Injunctions have also been granted to stop the pollution of streams,³ and prevent the pulling down of banks of rivers, whereby the plaintiff was exposed to inundations from which the banks had protected him;⁴ and to restrain the use of a rifle range until it had been rendered free from danger to the plaintiff, who was the occupier of adjacent lands.⁵

In cases of this description, where a party sues in respect of an alleged injury to his legal rights, it seems that an interlocutory injunction is granted solely upon the principle of preserving property until a decision on the legal rights can be had. In order to entitle the plaintiff to such an interference, for the purpose of protecting his property, pending the decision of his legal title, he must show at least a strong *prima facie* case in support of the title which he asserts, and also that he has not been guilty of any improper delay in applying for the interposition of the Court. The Court has then to consider the degree of inconvenience and expense to

¹ *Coulson v. White*, 3 Atk. 21; *White v. Cohen*, 1 Drew 312; *Johnstone v. Hall* 2 K. & J. 414; 2 Jur. N. S. 780; *Hodgson v. Duce*, 2 Jur. N. S. 1014, V. C. S.; *Elwell v. Crowther*, 10 W. R. 615, M. R.; *Hepburn v. Lordan*, 2 H. & M. 345; 11 Jur. N. S. 132, compromised on appeal, 2 H. & M. 353; 11 Jur. N. S. 254; and see 11 Jur. N. S. 636.

² *Ryder v. Bentham*, 1 Ves. S. 543; *Back v. Stacy*, 2 Russ. 111; *East India Company v. Vinolat*, 2 Atk. 83; *Turner v. Spooner*, 1 Dr. & Sm. 467; 7 Jur. N. S. 1068; *Davies v. Marshall*, 1 Dr. & Sm. 567; 7 Jur. N. S. 720; *Cooper v. Hubbuck*, 30 Beav. 160; 7 Jur. N. S. 457; and see *Ickenberry v. East India House Estate Company*, 10 Jur. N. S. 221, L. C.; *Jackson v. Duke of Newcastle*, *ib.* 688, 810, L. C.; *Low v. Innes*, *ib.* 1087, L. C.; *Weatherly v. Ross*, 1 H. & M. 349; *Cotching v. Bassett*, 32 Beav. 101; 9 Jur. N. S. 590; *Radcliff v. Duke of Portland*, 3 Giff. 702; 8 Jur. N. S. 1007; *Martin v. Headon*, 11 Jur. N. S. 6, V. C. K.; *Curriers Company v. Corbett*, 2 Dr. & Sm. 355; 11 Jur. N. S. 719; 13 W. R. 1066, L.J.J.; *Stokes v. City Offices Company*, 11 Jur. N. S. 560; 13 W. R. 537, V. C. W.; *Lawrence v. Austin*, 11 Jur. N. S. 576; 13 W. R. 981, M. R.; *Clarke v. Clark*, 11 Jur. N. S. 914; 14 W. R. 115, L. C.

³ *Elmhirst v. Spencer*, 2 McN. & G. 45; *Oldaker v. Hunt*, 6 De G. M. & G. 376; 1 Jur. N. S. 735; 19 Beav. 485; *Attorney-General v. Luton Board of Health*, 2 Jur. N. S. 180, V. C. W.; *Attorney-General v. Corporation of Birmingham*, 4 K. & J. 523; *Manchester & Sheffield Railway Company v. Workop Board of Health*, 23 Beav. 198; 3 Jur. N. S. 304; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, 14 W. R. 92, M. R.; *Spokes v. Banbury Board of Health*, *ib.* 123, V. C. W. For forms of orders, see *Seton*, 894; *Lingwood v. Stonemarket Papermaking Company*, 14 W. R. 78, V. C. W.

⁴ *Robinson v. Lord Byron*, 1 Bro. C. C. 558; *Lane v. Newdigate*, 10 Ves. 192, 194; *Chalk v. Watt*, 8 Mer. 688; *Seton*, 991; and see, as to smoke from flues, *Hervey v. Smith*, 1 K. & J. 339.

⁵ *Bannister v. Bigges*, 11 Jur. N. S. 276; 13 Jur. W. R. 379, M. R. As to ancient lights, water-courses, and other easements, see *Add. Wrongs*, 62-119; *Brooin Corn. Law*, 753-789; *Dixon*, 54-75; *Gale, passim*; L. C. Conv. 139-189; *Seton*, 894-898, 901, 902, 924; *Sugd. Stat.* 161-183; *Woodfall*, 676-681.

which granting the injunction would subject the defendant, in the event of his being in the right; and, on the other hand, the nature of the injury which the plaintiff may sustain, in the event of his complaint turning out to be well founded, and the Court refusing to interfere, pending the decision of the legal question; and, thus balancing the question between the two parties, and the extent of inconvenience likely to be incurred on the one side and on the other, the Court must exercise its discretion whether the injunction should be granted or withheld. Should the Court, in the exercise of this discretion, determine upon granting the injunction, it will, if the legal title is disputed, put the parties in the position of speedily obtaining a decision upon such title;¹ and for that purpose, either a trial of the legal title will be directed before the Court itself, or an issue will be directed to a Court of Common Law.² If there is no danger of irreparable mischief in the meantime, the motion for an injunction will be directed to stand over, till after the trial of the legal title.³

A person seeking an injunction to restrain an injury to his legal rights must apply to the Court without delay: for, if the injury has been completed at the time of the filing of the bill, the Court has (except, perhaps, in the case of fraud,) no jurisdiction; and the parties will be left to their remedy at law.⁴

It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right;—to bar the right within a shorter period, there must be such encouragement or other act by the party afterwards complaining as to

- 1 *Hilton v. Earl of Granville*, C. & P. 283, 292; 4 Beav. 130; *Harman v. Jones*, C. & P. 299; *Sensater v. Foster*, ib. 302; *Rigby v. Great Western Railway Company*, 2 Phill. 44; *Spottiswoode v. Clarke* ib. 154; 1 C. P. Coop. t. Cott. 254; 10 Jur. 1043; *Maines v. Taylor*, 2 Phill. 200; 10 Beav. 75; *Stevens v. Keating*, ib. 333; *Ridgway v. Roberts*, 4 Hare, 106; *Buxton v. James*, 5 De G. & S. 80; 16 Jur. 15; *Hodgson v. Earl Pousie*, 1 De G. M. & G. 6; 15 Jur. 102; *Standish v. Corporation of Liverpool*, 1 Drew. 1; *Attorney-General v. Eastlake*, 11 Hare, 265; 17 Jur. 801; *Barkart v. Houghton*, 27 Beav. 426; 5 Jur. N. S. 232; *Mayor of Cardiff v. Cardiff Waterworks Company*, 4 De G. & J. 596; 5 Jur. N. S. 953, 958; *Warden, &c., of Dover Harbour v. London, Chatham & Dover Railway Company*, 7 Jur. N. S. 453; 9 W. R. 523, L.J.J.; *Euden v. Firth*, 1 H. & M. 573.
- 2 *Baden v. Firth*, *ubi sup.*; *Freeman v. Tottenham & Hampstead Railway Company*, 11 Jur. N.S. 254; 13 W. R. 1004, L.J.J.
- 3 *Baden v. Firth* *ubi sup.*, and *Freeman v. Tottenham & Hampstead Railway Company*, 11 Jur. N. S. 254. For form of such order, where the motion was, by consent, turned into a motion for decree, see *Seton*, 860, No. 7.
- 4 *Laurence v. Austin*, 11 Jur. N. S. 576; 13 W. R. 981, M.R.; but see *Hindley v. Emery*, 11 Jur. N. S. 878; 14 W. R. 25, V.C.W., where the plaintiff, having come in time as to part of his case, an inquiry was directed as to the damages occasioned by so much of the injury as was completed previously to the filing of the bill; and see *Deere v. Guest*, 1 M. & C. 516.

make it a fraud in him to object. A party had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining, the Court, under the circumstances, refused a motion for an interlocutory injunction, but reserved the question of costs to the hearing. Since the General Orders of 1853, it is not necessary for a party to establish his legal right by an action at law before coming to this Court.¹ A railway company being about to construct their line of road along a public street, a bill was filed by the owner of the property in front of which the railroad would pass, to restrain the construction of the road in the manner contemplated, on the ground, as alleged, *that his property would thereby be greatly depreciated in value from divers causes, some of which were that the property would be rendered greatly less eligible from the inconvenience and danger occasioned by the rail cars running immediately in front thereof, and that the present traffic is likely, through the same cause, to be diverted from that part of the road.* Held, that the injury, as alleged, did not amount to a private nuisance, and that, therefore, the party complaining was not entitled to an injunction; and, held also, that as the injury complained of was not irreparable, the Court would not, if otherwise in favor of the plaintiff, have granted the application.²

The owner of two adjoining shops leased one to the plaintiff and the other to the defendant. The plaintiff's shop window had been so constructed as to present a side view to persons coming down the street, the object being to attract their attention and to obtain their custom for the wares displayed in the shop, and the privilege was shown to be a very important one. The tenant of the adjoining shop having placed a show-case in an open space or doorway of his shop, so as to intercept the view of the plaintiff's window, was restrained by injunction from continuing the obstruction.³ The defendant had built a drain from his premises to a lot of which the plaintiff became lessee; being desirous of building on this lot, he requested the defendant to stop up, or remove the drain, which the

¹ *Radenhurst v. Coate*, 6 Grant, 139.

² *Magee v. London & Port Stanley Railway Company*, 6 Grant, 170.

³ *Brumell v. Wharin*, 12 Grant, 284.

defendant at first refused, and afterwards neglected to do. It was alleged by the defendant that the cost of diverting the drain would have been \$14 only. *Held*, that the plaintiff was not obliged to take the law into his own hands, and divert the drain, and sue the defendant for the expense. And it appearing that the plaintiff's building could not safely be proceeded with until the drain was stopped up or diverted, an injunction was granted requiring the same to be done.¹ The plaintiff and L. "were tenants in common of an oil well; they filled an oil tank with oil equal in quantity to 2,400 barrels, of which 1,600 belonged to the plaintiff, and 800 to the defendant, and they agreed that the oil was not to be sold under \$5 per barrel; they were not partners. L., without authority, contracted for the sale of all the oil in the tank at \$1.25 per barrel. *Held*, on a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil; that the defendant's removal of it would be wrongful; but that, as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction; and that his only remedy was an action at law."²

The Court will also interfere, by injunction, to restrain the infringement of a patent, or piracy of a copyright. This interference was originally based upon the principle that the law did not give a complete remedy to those whose property was invaded: for, if each infringement of the patent or copyright were made a distinct cause of action, the remedy would be worse than the evil. The inventors or authors might be ruined, by the necessity of perpetual litigation, without ever being able to have a final establishment of their rights; and, in addition, the plaintiff had no means at Law of restraining the future use of his invention, or the publication of his work, injuriously to his title and interest.³

An injunction to restrain the infringement of a patent is not obtainable in Equity as a matter of course. The equitable title

¹ *Macaulay v. Roberts*, 13 Grant, 565.

² *Mason v. Norris*, 18 Grant, 500.

³ *Hogg v. Kirby*, 8 Ves. 216, 223; *Harmer v. Plane*, 14 Ves. 150; *Lawrence v. Smith*, Jac. 471; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 705, 706; *Baily v. Taylor*, 1 R. & M. 73; *Campbell v. Scott*, 11 Sim. 31; 4 Jur. 479; *Lewis v. Fullarton*, 2 Beav. 6. The Court may order an inspection of the alleged infringement, see *Singer Manufacturing Company v. Wilson*, 13 W. R. 560, V. C. W.; or an analysis: *Patent Type Company v. Walters*, Johns. 727.

flows from the legal title; and it was formerly the practice, on opening the case, to require the plaintiff to bring an action for the purpose of establishing his legal title;¹ but now, the legal right must be determined by the Court of Chancery: unless, under the particular circumstances of the case, the Court is satisfied that the question can be more conveniently tried in a Court of Common Law.² It is the duty of the Court to grant an interlocutory injunction, if the validity of the patent, and the fact of the infringement, are satisfactorily established.³ If, however, either or both of these facts are uncertain, it depends on the degree of doubt whether the Court will grant the injunction; and the Court will, in such case, consider the degree of convenience or inconvenience to the parties; and may either refuse the injunction, refuse it on the terms of an account being kept,⁴ or order the motion to stand over until the plaintiff's legal title is established.⁵

Similar principles apply to cases of copyright.⁶ At first, the Court of Chancery would not give assistance, unless the complainant had a clear legal right; but it now lends its aid when the legal title is either directly established by decision, or is apparently established by usage and possession. If, however, the legal title is doubtful, the Court may refrain from interfering before it is ascertained and determined: for the equitable title flows from the legal title; and, therefore, where the one is doubtful, the other does not necessarily follow.⁷ The Court also frequently refuses an injunction, where it acknowledges a right, if

¹ *Dodsley v. Kinnersley*, Amb. 403, 406.

² *Baylis v. Watkins*, 5 Jur. N. S. 1165, L.J.J.; *Young v. Pernie*, 1 De G. J. & S. 353: 10 Jur. N. S. 58.

³ *Bridson v. McAlpine*, 8 Beav. 229.

⁴ For form of undertaking to keep accounts, see *Seton*, 942.

⁵ *Bridson v. McAlpine*, 8 Beav. 229: *Bridson v. Brenecke*, 12 Beav. 1; and see *Bolton v. Bull*, 3 Ves. 140; *Harmerv. Plane*, 14 Ves. 130; *Hill v. Thompson*, 3 Mer. 622; *Kay v. Marshall*, 1 M. & C. 373; *Bacon v. Jones*, 4 M. & C. 433; *Collard v. Allison*, ib. 487; *Sanster v. Forster*, C. & F. 302; *Bullin v. Masters*, 2 Phill. 290; *Stevens v. Keating*, ib. 333; *Rogers v. Newell*, 6 Hare. 325, 339; 3 De G. M. & G. 614: 17 Jur. 171; *Caldwell v. Vandisengen*, 9 Hare. 416; *Smith v. London & South-Western Railway Company*, Kay, 408; *Price's Cordle Company v. Bousson's Cordle Company*, 4 K. & J. 727; *Tuck v. Silver*, Johns. 218; *Gardner v. Broadbent*, 2 Jur. N. S. 1041, V. C. S.; *Clark v. Ferguson*, 1 Giff. 184; *Whitton v. Jennings*, 1 Dr. & Sm. 110; S. C. *nom.* *Whitton v. Jennings*, 6 Jur. N. S. 164; *Eaden v. Firth*, 1 H. & M. 573; *Davenport v. Goldberg*, 2 H. & M. 281; *Betts v. Neilson*, 13 W. R. 804, V. C. W.; *Affid.* ib. 1028: 11 Jur. N. S. 679, L. J.J. For a collection of cases in Equity, as to injunctions relating to patents, with forms of orders, see *Seton*, 909-914.

⁶ *Low v. Routledge*, 10 Jur. N. S. 922: 12 W. R. 1069, V. C. K.: 11 Jur. N. S. 939: 14 W. R. 99, L. J.J.; *Margelton v. Wright*, 2 De G. & S. 420; *Mac Rae v. Holdsworth*, ib. 496; *Norton v. Nichols*, 4 K. & J. 475; *Boque v. Houston*, 5 De G. & S. 267: 16 Jur. 372; *Buxton v. James*, 5 De G. & S. 80: 16 Jur. 16; *Ollendorff v. Black*, 4 De G. & S. 209: 14 Jur. 1080; *Cassell v. Stiff*, 2 K. & J. 279; *Jeffreys v. Boosey*, 4 H. L. Ca. 815: 1 Jur. N. S. 615. For a collection of cases in Equity as to injunctions relating to copyright, with forms of orders, see *Seton*, 905-909: and see *Phillips on Copyright in Works of Literature and Art*, and in the application of Designs.

⁷ *Ants.*

the conduct of the party complaining has led to the state of things which occasions the applications ;¹ and an injunction has also been refused, where the matter which was the subject of the alleged piracy formed but a very inconsiderable part of the defendant's work : so that the damage done to the plaintiff might be calculated in a few hours.²

There must be separate bills upon each distinct invasion of a patent or copyright : unless there is a privity between the parties who have infringed the invention or pirated the work.³

There must be also an affidavit of title, when the injunction is applied for *ex parte*, or the plaintiff's legal title is denied. In the case of a patent, the party making the application must swear as to his belief, at the time of making it, that the invention was newly introduced into the country :⁴ for although, when he obtained his patent, he might, very honestly, have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince him that it was not his own invention, and that he was under a mistake when he made his previous declaration to that effect.⁵

It would greatly exceed the limits of our present inquiry to discuss the general rights of inventors and authors ; or to state the circumstances under which an exclusive property, in virtue of these rights, may be acquired or lost ; but, in examining those occasions in which injunctions will be granted, it is to be remembered that the Court will not interfere when the work is of a clearly irreligious, immoral, libellous, or obscene description. If an action cannot be maintained, nothing can be done in a Court of Equity : which is only ancillary to the law ; and, therefore, it will not give

1 *Platts v. Button*, 19 Ves. 417 ; S. C. *nom. Platts v. Button*, 6 Coop. 303 ; *Rundell v. Murray, Jac.* 311 ; *Saunders v. Smith*, 3 M. & C. 711.

2 *Baily v. Taylor*, 1 R. & M. 73 ; *Whittingham v. Wooler*, 2 Swanst. 428.

3 *Dilly v. Duff*, 2 Ves. J. 486. The plaintiff must not, however, act oppressively, and file an unnecessary number of bills ; if he does, the Court will order them to be consolidated, or make some other equivalent order : *Pozicell v. Webster*, 10 Jur. N. S. 137 ; 12 W. R. 186. L. C. ; 2 Dr. & Sm. 250 ; 9 Jur. N. S. 1189 ; *ante*.

4 *Mayer v. Spence*, 1 J. & H. 87 ; 6 Jur. N. S. 672 ; *Whitton v. Jennings*, 1 Dr. & Sm. 110, 111 ; S. C. *Whitton v. Jennings*, 6 Jur. N. S. 164.

5 *Hill v. Thompson*, 3 Mer. 622, 624 ; *Sturz v. De la Rue*, 5 Russ. 322, 328 ;

relief, except where the law will give damages.¹ Not only will the Court refuse to interfere, when it plainly sees that the work is obscene or immoral, but even if there is a doubt as to its evil tendency, an injunction will be refused;² and it may be laid down, as an universal rule, that where there is any doubt as to the exclusive legal title of the party claiming an injunction in aid of it, the Court will not exercise the jurisdiction, without giving an opportunity of trying such title.³

At times, there is considerable difficulty in determining whether a work is pirated or not: for instance, it is allowable to make a *bona fide* extract, quotation, or abridgment, or a *bona fide* use of common materials, in the composition of another book:⁴ for a man may fairly adopt part of another's labours in making an extract or quotation, but he must not do it unfairly, or, as Lord Ellenborough termed it, *animo furandi*. So he may abridge, if the invention, learning, or judgment bestowed in making that abridgment will really constitute a new work; but he must not do either, in a colourable manner, to gain an advantage to himself by a fraudulent evasion of the statute.⁵ So, in the case of a map or road-book, the Court will interfere to prevent a mere republication of a work which the labour and skill of another person had supplied to the world. The piracy, on such occasions, is frequently detected by the identity of the inaccuracies and errors;⁶ and the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book.⁷

The Court usually takes upon itself the task of inspection; and compares the work of the original author with the work alleged to be pirated;⁸ but an inquiry may be directed whether the books differ, and in what respect.

1 *Lawrence v. Smith*, Jac. 471; *Hime v. Dale* 2 Camp. 27, n.

2 *Walcot v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Mer. 435, 438; *Burnett v. Chetwood*, ib. 441, n.

3 *Bramwell v. Halcomb*, 3 M. & C. 737; *Spottinwoode v. Clarke*, 2 Phill. 154: 1 C. P. Coop. & Cott. 254: 10 Jur. 1043.

4 Short abridgments are allowed: *Bell v. Walker*, 1 Bro. C. C. 451; *Gyles v. Wilcox*, 2 Atk. 143.

5 *Butterworth v. Robinson*, 5 Ves. 709; *Longman v. Winchester*, 16 Ves. 269; *Matthewson v. Stookdale*, 12 Ves. 270; *Whittingham v. Wooller*, 2 Swanst. 428; *Wilkins v. Atkin*, 17 Ves. 422; *Saunders v. Smith*, 3 M. & C. 711; *Lewis v. Fullarton*, 2 Beav. 6; *Spottinwoode v. Clarke*, *ubi sup.*; *Jarrold v. Houlston*, 3 K. & J. 708: 3 Jur. 1051; *Hotten v. Arthur*, 1 H. & M. 603.

6 *Cary v. Fadden*, 5 Ves. 24, and see *Longman v. Winchester*, *ubi sup.*

7 *Bramwell v. Halcomb*, *ubi sup.*; *Murray v. Pogue*, 1 Drew. 353.

8 See *Whittingham v. Wooller*, Swanst. 428; *Jarrold v. Houlston*, 3 K. & J. 708: 3 Jur. N. S. 1051.

The injunction, when issued, restrains the publication of those parts which are found to have been pirated.¹ Where, however, the Court, availing itself of the evidence read pending the motion, was led to conclude, that if the parts affected with the character of piracy were taken away, there would be left an imperfect work which could not, to any useful extent, serve the purpose intended by the publication, the injunction, to restrain the publication of any parts pirated from the plaintiff's work, was granted, without waiting till all the parts pirated could be distinctly marked.²

And, in general, if the parts pirated are so mingled with the original portions of a work that they cannot be separated, the Court will enjoin the publication of the whole : although a very large proportion of the work may be unquestionably original. Upon this subject, Lord Eldon observed, that " He who has made an improper use of that which does not belong to him, must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses, in any work, to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me ; and if the parts of the work cannot be separated, and if by that means the injunction which restrained the publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame."³

By analogy to the principle upon which the Court proceeds in cases of copyright, it will also interfere to restrain the publication of manuscript treatises, or private letters which bear the character of literary composition. This was established with regard to manuscripts in *Mr. Webb's* and *Mr. Forrester's* cases : the former of whom had his Precedents of Conveyancing stolen out of his chambers ; and the latter had his notes copied by a clerk to the gentleman to whom he had lent them :⁴ in both instances, the printing and publishing them was restrained by injunction. The same protection was

1 *Carnan v. Bowles*, 2 Bro. C. C. 80 ; — *v. Leadbetter*, 4 Ves. 681 ; *Jeffery v. Bowles*, 1 Dick 429 ; *Mawgan v. Tegg*, 2 Russ. 385.

2 *Lewis v. Fullarton*, 2 Beav. 6.

3 *Mawgan v. Tegg*, 2 Russ. 385, 391 ; and see *Jarrold v. Houston*, 3 K. & J. 706 ; 3 Jur. N. S. 1051.

4 *Webb v. Rose*, cited 2 Bro. P. C. ed. Toml. 138 ; *Forrester v. Waller*, cited *ib.* : *Burr*. 2331 ; and see *Southey v. Sherwood*, 2 Mer. 436.

extended to Lord Clarendon's History, a copy of which had been given by his son to Mr. Gwynne: for it was not to be presumed, from such a gift, that he was to have the profits of multiplying it in print, although he might make every use of it except that.¹

Upon the same principle, the publication of works of art, which the author thinks proper to keep private, or even of a catalogue describing them, will be restrained.²

Letters which bear the character of literary compositions must be treated as within the laws protecting the rights of literary property; and a violation of those rights is affected with the same consequences as the publication of a treatise in manuscript. Upon this ground Pope's, Swift's and Lord Chesterfield's Letters have all been protected by means of an injunction;³ but a question has been raised, and a doubt suggested, how far the like protection would be given, where the letters published did not fall, in strictness, within the terms of literary compositions. It is now, however, settled that the writer of a letter has a joint property in it, with the person to whom it is addressed. The receiver has a special property in it; but no more: it is a gift to him for the purpose of reading, and in some cases for the purpose of keeping it; but *ultra* the purposes for which it was sent, the property of the letter remains in the sender: which being so, it cannot be published without the writer's consent.⁴ And it is immaterial whether the publication is made with a view to profit or not: if for profit, the party is then selling; and if not for profit, he is then giving that of which a portion belongs to the writer.⁵ But, notwithstanding this right of property, the conduct of the plaintiff may be such as not to entitle him to the interference of the Court. Thus, the plaintiff was left to his legal remedy, where he had held the defendant out to the public as a person giving false intelligence upon spurious authority, and the intelligence had come from the plaintiff himself: as was proved and confirmed by several letters which formed the subject of dispute.⁶

1 *Duke of Queensberry v. Shebbeare*, 2 Eden, 820.

2 *Prince Albert v. Strange* 1 McN. & G. 25: 13 Jur. 109; 2 Do G. & S. 662.

3 *Pope v. Curl*, 2 Atk. 342; *Thompson v. Stanhope*, Amb. 787.

4 If the solicitor of a company writes a letter apparently on behalf of the company, he is not entitled to prevent its publication, although he swears it was written in his private capacity: *Howard v. Gunn*, 32 Beav. 462.

5 *Earl of Granard v. Dunkin*, 1 Ball & B. 207; *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst. 402.

6 *Lord and Lady Perceval v. Phipps*, 2 V. & B. 19.

Injunctions will also be granted to restrain infringements of the right to the title of a book or periodical.¹

A similar jurisdiction exists in Equity to restrain, by injunction, the improper use by one man of the name or trade-mark of another, and is exercised upon similar principles to those which are applied in cases of copyrights, patents, and other rights of a similar description. But it rests upon property, and not upon the fraud on the public; and, therefore, will not be exercised, unless it appears that the plaintiff has sustained, or is likely to sustain, pecuniary loss from the acts complained of.²

Any article of manufacture, not protected by patent, may be made and sold by any person; and that too by the name given to it by the inventor.³ But a man has no right to sell his own goods or manufactures, under the pretence that they are the goods or manufactures of another. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. Hence there arises so much of a property in a name or mark, that the Court will interfere by injunction against a person using the name or mark of another, even though there be no intentional deception.⁴

A party professed to sell the secret of a preparation called "Jones' Patent Flour" and became bound not to disclose the

- 1 *Hogg v. Kirby*, 8 Ves. 215; *Prouett v. Mortimer*, 2 Jur. N. S. 414, V. C. S.; *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; *Ingrain v. Stiff*, 5 Jur. N. S. 947; and see *Bradbury v. Dickens*, 27 Beav. 53; *Correspondent Newspaper Company v. Saunders*, 11 Jur. N. S. 540; 13 W. R. 804, V. C. W.
- 2 *Webster v. Webster*, 3 Swanst. 400, n.; *Martin v. Wright*, 6 Sim. 297; *Routh v. Webster*, 10 Beav. 561; *Clark v. Freeman*, 11 Beav. 112; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur. N. S. 479; *Batty v. Hill*, 1 H. & M. 264; *Hall v. Barrows*, 9 Jur. N. S. 483, M. R.; 10 Jur. N. S. 55, L. C.; *Leather Cloth Company v. American Leather Cloth Company*, 11 Jur. N. S. 513; 13 W. R. 873, H. of L.; 10 Jur. N. S. 81; 12 W. R. 289, L. C.; and see *Empress of Austria v. Day*, 3 De G. F. & J. 217; 7 Jur. N. S. 639; 2 Giff. 628; 7 Jur. N. S. 483.
- 3 *Blanchard v. Hill*, 2 Ark. 484; *Fanning v. Macrae*, 9 Jur. N. S. 322, V. C. W.
- 4 Per Lord Langdale, in *Perry v. Truitt*, 6 Beav. 73; and see *Millington v. Fox*, 8 M. & C. 338; *Molten v. Doenmann*, 8 M. & C. 1; *Gout v. Adeptoglu*, 6 Beav. 69, n.; *Franks v. Weaver*, 10 Beav. 297; *Shrimpton v. Leigh*, 18 Beav. 194; *Rogers v. Noell*, 6 Hare, 325; 3 De G. M. & G. 614; 17 Jur. 171; *Burgess v. Burgess*, 3 De G. M. & G. 896; 17 Jur. 202; *Collins Company v. Brown*, 3 K. & J. 423; 3 Jur. N. S. 327; *Farina v. Silcock*, 4 K. & J. 650; 6 De G. M. & G. 214; 2 Jur. N. S. 1008; *Welch v. Knott*, 4 K. & J. 747; *Churton v. Douglas*, Johns. 174; 6 Jur. N. S. 887; *Dent v. Turpin*, 2 J. & H. 139; 7 Jur. N. S. 673; *Woodham v. Ratcliff*, 1 H. & M. 259; *Batty v. Hill*, ib. 204; *Graham v. Bustard*, ib. 447; *Cartier v. Cartile*, 31 Beav. 292; 8 Jur. N. S. 188; *Edelsten v. Edelsten*, and *Hall v. Barrows*, *ubi sup.*; *Bury v. Bedford*, 9 Jur. N. S. 956, M. R.; 10 Jur. N. S. 503, L.J.J.; *Colonial Life Assurance Company v. Home & Colonial Company*, 33 Beav. 548; 10 Jur. N. S. 907; *McAndrew v. Bassett*, 10 Jur. N. S. 492, V. C. W.; ib. 550; 12 W. R. 777, L. C.; *Banks v. Gibson*, 11 Jur. N. S. 180; 13 W. R. 1012, M. R.; *Ponsardin v. Peto*, 33 Beav. 642; *Glenny v. Smith*, 2 Dr. & S. 476; *Leather Cloth Company v. American Leather Cloth Company*, 11 Jur. N. S. 513; 13 W. R. 873, H. of L. For the principles on which an account is directed in such cases, see *Mort v. Cowton*, 83 Beav. 578; 10 Jur. N. S. 1012, M. R.; *Harrison v. Taylor*, 11 Jur. N. S. 408, V. C. W.; and for a collection of cases as to injunction respecting trade-marks, with forms of orders, see *Seton*, 914—917.

secret to any other person in Canada, nor make use of it himself, except at the instance of and for the benefit of his vendees; notwithstanding he afterwards commenced selling a similar article done up in bags bearing a general resemblance to those of his vendees, although differing in some minute particulars, and led parties purchasing it to believe that it was the same article. The Court granted an injunction to restrain him from selling the same preparation, or any other preparation done up in such a manner as to lead the public to suppose that it was the same article, and from representing it to be such, although it was sworn by the vendor that the preparations were not the same.¹

The plaintiff had duly registered under the Statute as his trade mark in the manufacture of Soap, the word "Imperial" with a star following it: the defendant in his manufacture of Soap put on his boxes the words "Imperial Bibasic Soap." An injunction was granted restraining him from using the word "Imperial" as being a portion of the trade mark of the plaintiff.²

The plaintiff carried on business in the City of L. having for his sign a figure of a gilt lion, and designating his place of business "The Golden Lion"; the defendant for some years had had the conduct of this business, and having determined on commencing on his own account the same line of business, opened a shop in front of which he placed a figure somewhat similar to that used by the plaintiff. The Court on the application of the plaintiff restrained the defendant from using, as a sign, this or any similar figure.³

Plaintiff sold liquid medicine put up in bottles labelled "Perry Davis's Vegetable Pain Killer": defendant subsequently sold a similar kind of medicine put up in bottles labelled "The Great Home Remedy, Kennedy's Pain Killer." Plaintiffs claimed the word "Pain Killer" alone as their trade mark. It was proved that the medicine of plaintiffs was known and sold in the market by the name of "Pain Killer" before the defendant's was introduced and that the trade would not be deceived by the defendant's labels, although the general public might be deceived. An injunction was

¹ *Whitney v. Hickling*, 5 Grant, 605.

² *Crawford v. Shattock*, 13 Grant, 149.

³ *Walker v. Alley*, 13 Grant, 386.

granted, restraining the use by the defendant of the word "Pain Killer" as a trade mark, with an account of profits, and costs.¹

The plaintiffs filed a bill to restrain the use of a label which, they alleged, was an infringement of their trade mark, or of any other label which resembled the same. The defendant admitted that the label he had used was an infringement, but he said that he had discontinued the use of it before suit on hearing that the plaintiffs complained of the label, and that after suit he informed the Solicitors of the plaintiffs of this discontinuance, disclaimed all right of using the label, and was ready to account for the profits he had made, and to pay the costs of the suit. The plaintiff's Solicitors declined to discontinue the suit; and, the defendant having put in his answer, the plaintiff brought the cause on for hearing upon bill and answer. The defendant not disputing that his label was an imitation of the plaintiff's, or that he was aware of the plaintiff's property in their label, an injunction was granted against using the label complained of, or any other label similar to, or resembling the plaintiff's; and the defendant was ordered to pay the costs of the suit.² Hiram Piper, and Noah Piper carried on business under the name of "*Hiram Piper & Brother.*" They afterwards dissolved partnership, and each carried on like business in his own name. Subsequently Hiram assigned his business to the plaintiff, with authority to carry it on in Hiram's name, and then two sons of Noah Piper carried on a similar business next door, under the firm of "*H. Piper & Co.*" An injunction to restraining the use of that name was refused.³ A cigar manufacturer, to distinguish his cigars from others, called them "Cable Cigars," and afterward adopted a method of stamping on each cigar, in bronze, an elliptical figure, with the name "S. DAVIS," and the word "CABLE" within the same. A rival firm, two years afterwards, adopted the same method, using for the purpose a trade mark identical with this, except that they substituted their initials "C. P. R. & C." for the other's name, and the word "CIGAR" for the word "CABLE." It was proved that persons had bought these cigars supposing them to be the Cable stamped cigars. *Held*, that

1 *Davis v. Kennedy*, 18 Grant, 528.

2 *Radway v. Coleman*, 15 Grant, 50; and see *Brockington v. Patner*, 18 Grant, 428.

3 *Aikens v. Piper*, 15 Grant, 581.

the manufacturer of the Cable cigars was entitled to an injunction to restrain the other parties from using the trade mark which they had so adopted¹

With respect to these cases, it may be observed, that the remedy given in Equity will be withheld, if there has been any improper conduct on the part of the plaintiff. On this principle, the Court will refuse to grant an injunction, where the plaintiff has made false representations to the public concerning the article which he seeks to protect.²

By the Trade Marks and Designs Act of 1861—(24 Vic., ch. 21.) Further remedies are given for the infringement of trade-marks; but it is provided, that nothing therein contained is to take away or prejudicially affect any remedy at Law or in Equity.

Injunctions may also be granted to restrain corporations and other public bodies from committing acts which are *ultra vires*, or from appropriating their property for purposes other than those for which they were constituted, or to prevent the excessive or undue exercise by them of parliamentary powers. Instances of such interference are of very frequent occurrence; but are too numerous to be referred to in detail within the limits of the present Treatise.³

¹ *Davis v. Reid*, 17 Grant, 69.

² *Perry v. Truefitt*, 6 Beav. 66; *Pidding v. How*, 8 Sim. 477; *Flavel v. Harrison*, 10 Hare, 467; 17 Jur. 368; *Leather Cloth Company v. American Leather Cloth Company*, 10 Jur. N. S. 81; 12 W. R. 289, L. C.; 11 Jur. N. S. 513; 13 W. R. 873, II. of L.; and see *Edelsten v. Vick*, 11 Hare, 75.

³ See cases collected in *Seton*, 926, *et seq.*; 929, *et seq.*; and forms of orders, 925, *et seq.*; 923, *et seq.*; and for the subsequent cases, see *Simpson v. Westminster Palace Hotel Company*, 8 H. L. Ca. 712; 6 Jur. N. S. 985; 2 De G. J. & J. 141; 6 Jur. N. S. 764; *ib.* 747; V. C. W.; *Stockton & Darlington Railway Company v. Brown*, 9 H. L. Ca. 246; 6 Jur. N. S. 1168; *Lind v. Isle of Wight Ferry Company*, 1 N. R. 13, V. C. W.; *Wedmore v. Mayor, &c., of Bristol*, 11 W. R. 134, V. C. S.; *Mauvel v. Midland Great Western Railway (of Ireland) Company*, 1 H. & M. 180; 9 Jur. N. S. 600; *Peto v. Brighton, Uckfield & Tunbridge Wells Railway Company*, 11 W. R. 874, V. C. W.; *Biddulph v. Vestry of St. George, Hanover Square*, 9 Jur. N. S. 953; 11 W. S. 739, L.J.J.; *ib.* 524; 9 Jur. N. S. 434, V. C. S.; *Attorney-General v. Metropolitan Board of Works*, 1 H. & M. 298; *Seavine v. Great Northern Railway Company*, 10 Jur. N. S. 191; 12 W. R. 391, L.J.J.; 9 Jur. N. S. 1196, V. C. W.; *Macey v. Metropolitan Board of Works*, 10 Jur. N. S. 333; 12 W. R. 619, V. C. W.; *Rogers v. Hull Dock Company*, 10 Jur. N. S. 1245; 13 W. R. 217, L. C.; 12 W. R. 1101, V. C. W.; *Hutton v. Scarborough Cliff Hotel Company (Limited)*, 11 Jur. N. S. 551; 13 W. R. 631, L. C.; 2 Dr. & Sm. 514, 521; 11 Jur. N. S. 849, V. C. K.; *Lloyd v. London, Chatham & Dover Railway Company*, 11 Jur. N. S. 380; 13 W. R. 693, L.J.J.; *Galloway v. Mayor, &c., of London* (No. 1), 2 De G. J. & S. 213; 10 Jur. N. S. 552; (No. 2), 11 Jur. N. S. 474, 537; 13 W. R. 701, 933, L.J.J.; 11 Jur. N. S. 293, M. R.; *Goold v. Great Western Deep Dean Coal Company*, 6 N. R. 357, L. C.; 13 W. R. 712, V. C. W.; *Simpson v. South Staffordshire Waterworks Company*, 11 Jur. N. S. 453; 13 W. R. 729, L.C.; *Flower v. London, Brighton & South Coast Railway Company*, 2 Dr. & Sm. 330; 11 Jur. N. S. 406; *Attorney-General v. Mayor, &c., of Kingston-upon-Thames*, 11 Jur. N. S. 596; 13 W. R. 883, V. C. W.; *Pentney v. Lynn Paving Commissioners*, 13 W. R. 933, V. C. K.; *Vane v. Cockermouth Railway Company*, *ib.* 1015, V. C. K.; *Featherstonhaugh v. Lee Moor Clay Company*, 14 W. R. 97, V. C. W.

Upon grounds of irreparable mischief, Courts of Equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade, or secrets of title, or other secrets of the party important to his interests.¹ The Court, however, refused to grant an injunction to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired;² and it will not interfere to prevent the disclosure of secrets, by means of which frauds have been committed.³

Another purpose for which injunctions may be applied, is to prevent the alienation of property, where it would work an irremediable or gross injustice. Under such circumstances, an injunction will be granted; and it often has been, when the alienation contemplated was strictly legal, but other circumstances, which the Courts of Law could not take notice of, would have rendered it improper that such an alienation should be made. Thus, in the case of negotiable instruments, if a bill or note affected with fraud is transferred to a *bona fide* holder, without notice, the latter may be entitled to recover upon it: for the bill or note would be a good security in the hands of the person to whom it was so transferred; and, therefore, the person against whose rights they may be made available is entitled to protection from that danger, and the mischief attending it.⁴ In such cases, the injunction will usually be granted, on an *ex parte* application, supported by an affidavit verifying the truth of the fraudulent circumstances, lest the defendant should, upon intimation of the suit, defeat its object by negotiating the security.⁵ Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorsee, a *bona fide* holder of it will be restrained from suing the acceptor upon it; and the Court will, at the hearing, direct the forged instrument to be delivered up to be cancelled: for, though the holder may have

¹ *Earl Cholmondeley v. Lord Clinton*, 10 Ves. 261; *Evitt v. Price*, 1 Sim. 483; *Yoratt v. Winyard*, 1 J. & W. 304; *Davies v. Clough*, 8 Sim. 282; *Lewis v. Smith*, 1 McN. & G. 417; *Holloway v. Holloway*, 13 Beav. 209; *Morrison v. Moot*, 9 Hare, 241; 15 Jur. 787; 16 Jur. 321, L. JJ.

² *Newbery v. James*, 2 Mer. 446.

³ *Follett v. Jeffreys*, 1 Sim. N. S. 1; *Gartside v. Outram*, 3 Jur. N. S. 39, V. C. W.

⁴ *Smith v. Haytwell*, Amb. 66; *Lloyd v. Gurdon*, 2 Swanst. 180; *Patrick v. Harrison*, 3 Bro. C. C. 476; *Lord Portarlington v. Soulbey*, 3 M. & K. 104; *Karl of Milltown v. Stewart*, 8 Sim. 371; 3 M. & C. 18; *Quarrier v. Colston*, 1 Phill. 147; *Mailand v. Backhouse*, 16 Sim. 58; 12 Jur. 45, L. C.; *Espey v. Lake*, 10 Hare, 200; and for a collection of cases and forms of orders, see *Seton*, 918, 919.

⁵ *Smith v. Aykell*, 3 Atk. 586; *Hood v. Aston*, 1 Russ. 412.

paid a value for it, yet, if the endorsement under which he received it is a forgery, it is the same thing as if there was no indorsement of it, and then he is not in truth the holder of it : for he has no title by indorsement, and that was the only way by which he could obtain a title to it.¹

By an Act of the Provincial Legislature, the town of St. Catharines was authorized to issue debentures to the amount of £45,248, for the liquidation of which, a special rate was directed to be levied, the proceeds of which were directed to be invested, and form a sinking fund for this purpose ; by the same act the town was prohibited from passing any by-law to create any new debt extending beyond the year in which such by-law was passed, except for the construction of water works, until the debt was reduced to £25000. The special rate authorized to be imposed had been duly levied and collected, but instead of investing the same to form a sinking fund for the payment of the debentures, it was alleged, it had been applied to the general purposes of the Town, and the debt had not been reduced. The defendants denied the misapplication of the fund, but did not shew how it had been applied ; and with a view of inducing the County Council to remove the County Town of Lincoln, from Niagara to St. Catharines, the Town Council of St. Catharines, without any by-law authorizing the same, contracted with certain builders to erect a gaol and court house for the use of the County, at an outlay of £3000, to be completed in two years. Upon an application made at the instance of certain of the holders of the debentures under the before mentioned Act the Court restrained the Town of St. Catharines from suffering or permitting the buildings to be proceeded with. On an appeal to the full Court the injunction was dissolved, it appearing that the contract which had been entered into between the corporation and the contractor had been cancelled, and that no liability had been incurred by the corporation extending beyond the year ; but if it had been shown that any Act of the corporation would have had the effect of incurring a liability payable in a future year, the injunction would have been retained to the hearing. On production of the contract in Court, it appeared that the rescission

¹ *Edaile v. La Nauze*, 1 Y. & C Ex. 394 ; and see *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4

referred to had been effected by cancelling the signatures to the document, which being objected to as not *legally* discharging the corporation from liability the Court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. (Vankoughnet, C., *dubitante* as to any necessity therefor.¹)

Upon a like principle, the Court will interfere to restrain the transfer of stock, or the payment of dividends, or the sale of specific chattels, where the title to the stock is controverted between principal and agent;² or where it is proposed to pay the dividends on erroneous principles;³ or where it is necessary to protect the enjoyment of specific chattels, which cannot be the subject of compensation in damages.⁴

The Court, acting upon the principles above pointed out, will also grant an injunction to restrain a party from making vexatious alienations of the subject-matter of the suit, *pendente lite*.⁵ It will, therefore, enjoin a vendor from conveying the legal title to real estate, pending a suit for the specific performance of a contract for the sale of that estate;⁶ but it will not interfere in this manner, before the hearing, if there is any serious question whether any contract exists between the parties.⁷

In like manner, sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons: as in cases of trusts and special authorities, where the party is abusing his trust or authority;⁸ and where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, Courts of Equity will also restrain the purchaser from paying over the purchase-money.⁹

¹ *Edinburgh Life Assurance Company v. St. Catharines*, 10 Grant, 379.

² *Lord Chedworth v. Edwards*, 8 Ves. 46; but see *Coz v. Paztons*, 1 Madd. Ch. Pr. 2nd ed. 156; 3rd ed. 215.

³ *Reece v. Parkins*, 2 J. & W. 390; *Sturge v. Eastern Union Railway Company*, 7 De G. M. & G. 158; 1 Jur. N. S. 713; *Henry v. Great Northern Railway Company*, 4 K. & J. 1; 3 Jur. N. S. 1117; 1 De G. & J. 606; 3 Jur. N. S. 1133.

⁴ *Lady Arundell v. Phipps*, 10 Ves. 139; *Wood v. Rowcliffe*, 2 Phill. 382.

⁵ *Daly v. Kelly*, 4 Dow, 440; *Powel v. Wright*, 7 Beav. 444, 452; *Rhodes v. Buckland*, 16 Beav. 212, 219; and see *Turner v. Wight*, 4 Beav. 40; *Great Western Railway Company v. Birmingham & Oxford Railway Company*, 2 Phill. 597; *Shrewsbury & Chester Railway Company v. Shrewsbury & Birmingham Railway Company*, 1 Sim. N. S. 410; 15 Jur. 648.

⁶ *Ehly v. Baldwin*, 16 Ves. 267; *Daly v. Kelly*, 4 Dow, 440.

⁷ *Hadley v. London Bank of Scotland*, 11 Jur. N. S. 554, V. C. K.; 13 W. R. 978, L.JJ.

⁸ *Anon.*, 6 Madd. 10.

⁹ *Green v. Lowe*, 3 Bro. C. C. 217; *Mathews v. Jones*, 2 Anst. 506; *Hawthshaw v. Parkins*, 2 Swans. 549.

So also, husbands may be restrained from transferring property, in fraud of the equitable rights of their wives.¹

Acting upon the same principles, the Court will, where there is a dispute respecting the right of presentation to an ecclesiastical benefice, not only restrain the party having the legal right of presentation from presenting, but it will also enjoin the bishop from inducting, and from taking advantage of a lapse, pending the litigation, by collating to the benefice, till the decree of the Court.²

The Court has also, upon the same ground, restrained the trustees of a dissenting chapel, from appointing, as a minister of that chapel, a person not duly qualified according to the constitution of the chapel, to hold the office: although it refused that part of the motion which asked for an injunction to restrain the trustees from permitting persons not duly qualified from officiating occasionally, during the short time that might elapse before the hearing, when the facts upon both sides must be known.³

An injunction will also be granted to restrain the employment of a ship in a manner forbidden by the charter-party;⁴ or the indorsement of the certificate of a ship's registry;⁵ or the sailing of a ship, upon the application of a part owner, whose share is unascertained, in order to ascertain that share, and to obtain the usual security given in the Court of Admiralty for the due return of the ship.⁶

So an injunction will be granted against the removal of timber, wrongfully cut down.⁷

Injunctions will also be granted to compel the due observance of agreements and covenants, where there is no effectual remedy at

1 *Anon*, 9 Mod. 43; *Roberts v. Roberts*, 2 Cox, 422; *Flight v. Cook*, 2 Ves. 8. 619; *Cadogan v. Kennett*, Cowp. 432, 436.

2 *Nicholson v. Knapp*, 9 Sim. 320; *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139; and see *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112; and *Seton*, 904; *ib.* 943, No. 1.

3 *Milligan v. Mitchell* 1 M. & K. 446; *Attorney-General v. Munro*, 2 De G. & S. 122; *Attorney-General v. Murdoch*, 7 Hare, 445; 1 De G. M. & G. 36; *Daugars v. Rivaz*, 28 Beav. 233; 6 Jur. N. S. 854; *Attorney-General v. Gould*, *ib.* 485; *Perry v. Shipway*, 1 Giff. 1: 5 Jur. N. S. 535; 4 De G. & J. 353; 5 Jur. N. S. 1015.

4 *De Mattos v. Gibson*, 4 De G. & J. 276; 5 Jur. N. S. 347; *Sevin v. Deslandes*, 7 Jur. N. S. 837, M. R.: *Collins v. Lamport*, 11 Jur. N. S. 1; 13 W. R. 283, L. C.

5 *Thompson v. Smith*, 1 Madd. 395; and see *Follett v. Delany*, 2 De G. & S. 235; *Clarke v. Batters*, 1 K. & J. 242; *Armstrong v. Armstrong*, No. 1, 21 Beav. 71: 1 Jur. N. S. 859, 860; *De Mattos v. Gibson*, and *Sevin v. Deslandes*, *ubi sup.*; *Orr v. Dickenson*, Johns. 1; *Holderness v. Lamport*, 29 Beav. 120; 7 Jur. N. S. 564. For a collection of cases as to injunctions respecting ships, with forms of orders, see *Seton*, 332-336.

6 *Haly v. Goodson*, 2 Mer. 77; *Christie v. Craig*, *ib.* 137.

7 *Anon*, 1 Ves. J. 93.

Law.¹ Thus, in the old case of the parish bell, where certain persons, owning a house in the neighbourhood of a church, entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their disturbance: the agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour.² Upon the same ground, a celebrated play-writer, who had covenanted not to write any dramatic performances for another theatre, was, by injunction, restrained from violating the covenant.³ So an author, who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing;⁴ and an actor will be restrained from performing in violation of an agreement.⁵

Upon the same principle, an injunction will be awarded, to restrain the erection of buildings in breach of a covenant not to build in a particular manner, or on a particular site;⁶ and it is not necessary, in order to justify the interference of the Court, that the covenant should run with the land.⁷

Injunctions have also been granted to restrain a person, who has covenanted not to exercise a certain trade within certain limits, from exercising such trade within the prescribed limits.⁸ It is, however, quite settled that the mere sale of the goodwill of a business does not imply a contract on the part of the vendor not to set up a similar business, nor restrict him as to the place of carrying on that business.⁹

The plaintiff purchased the defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business

1 For cases and forms of orders, see *Seton*, 921-925.

2 *Martin v. Nutkin*, 2 P. Wms. 208.

3 *Morris v. Colman*, 13 Ves. 437; *Clarke v. Price*, 2 Wils. 157.

4 *Barfield v. Nicholson*, 2 S. & S. 1; *Colburn v. Simms*, 2 Hare, 543.

5 *Lunley v. Wagner*, 5 De G. & S. 485; 1 De G. M. & G. 604; 16 Jur. 871; *Webster v. Dillon*, 3 Jur. N. S. 452, V. C. W.; *contra*, *Kemble v. Kean*, 6 Sim. 333; see also *Fechter v. Montgomery*, 33 Beav. 22.

6 *Rankin v. Huskisson*, 4 Sim. 13; *Patching v. Dubbins*, Kay, 1: S. C. *nom.* *Patching v. Gubbins*, 17 Jur. 1113; *Coles v. Sims*, Kay, 50; 5 De G. M. & G. 1: 13 Jur. 683; *Pigott v. Stratton*, Johns. 341; 1 De G. F. & J. 83; 6 Jur. N. S. 129; *Lloyd v. London, Chatham & Dover Railway Company*, 11 Jur. N. S. 380; 13 W. R. 698, L.JJ.

7 *Tulk v. Moxhay*, 2 Phill. 774; 13 Jur. 89; 11 Beav. 571; *Moxhay v. Inderwick*, 1 De G. & S. 708; *Wilson v. Hart*, 11 Jur. N. S. 735; 13 W. R. 988, V. C. W.

8 *Williams v. Williams*, 2 Swanst. 253; *Smith v. Mules*, 9 Hare, 556; *Simpson v. Chapman*, 4 De G. M. & G. 154; *Churton v. Douglass*, Johns. 174; 5 Jur. N. S. 887; *Clarkson v. Edge*, 33 Beav. 227; *Fox v. Seard*, *ib.* 327; and see *Sainter v. Ferguson*, 1 McN. & G. 286; 14 Jur. 255.

9 *Churton v. Douglas*, *ubi sup.*; and see cases cited 2 Swanst. 254, n. (a).

there again. The plaintiff afterwards sold out to one C. and entered into a like agreement with him; *held*, that the plaintiff after this sale had not such an interest in the contract with the defendant as entitled him to an injunction, and that his remedy, if any, was at law.¹ The defendant sold to the plaintiff the goodwill of the business of an innkeeper, which he had carried on under the name of "Mason's Hotel," or "The Western Hotel,"—he afterwards resumed the business under the same name and in the same premises, and represented to his old customers and the public that the business so resumed was the identical business sold: *Held*, that though in the absence of any express covenant the vendor would have been entitled to engage in a business similar to that he had sold, yet he was not at liberty to represent the new business as the same identical business as the old: *Held*, also that a covenant in the agreement that the vendor should pay \$4000 in the event of his carrying on business as an innkeeper, within ten years, did not affect the purchasers' right to an injunction; nor did the circumstance of their having removed to other premises.² Several incorporated companies and individuals engaged in the manufacture and sale of salt entered into an agreement whereby it was stipulated that the several parties agreed to combine and amalgamate under the name of "The Canadian Salt Association" for the purpose of successfully working the business of salt manufacturing, and to further develop and extend the same, and which provided that all parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees. *Held*, on demurrer that this agreement was not void as contrary to public policy, or as tending to a monopoly, or being in undue restraint of trade; that it was not *ultra vires* of such of the contracting parties as were incorporated companies, but was such in its nature as the Court would enforce.³

Where bankers had sanctioned an arrangement entered into by certain persons, copartners, who were indebted to them, whereby it was agreed that, upon the retirement of one of the copartners,

¹ *Jones v. Wooley*, 16 Grant, 106.

² *Mossop v. Mason*, 16 Grant, 302.

³ *Ontario Salt Company v. Merchant's Salt Company*, 18 Grant, 540.

(the plaintiff,) the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the plaintiff, who was the retiring partner, from his liability to them, but they afterwards attempted, by means of the debt, to make the retiring partner a bankrupt, they were restrained from so doing by injunction.¹

And so, an injunction has been awarded, to restrain the publication by the defendant (in violation of his agreement,) of the fact that the plaintiff had consented to a judgment being entered up against him by the defendant.²

Injunctions have also been frequently granted, to restrain lessees, who had covenanted to keep the banks of rivers or ponds in repair, from destroying or impairing them ;³ or an outgoing tenant from removing dung or crops, contrary to express covenants contained in his lease ;⁴ or to restrain the ploughing up of meadow land ;⁵ and in one of the earliest cases upon this subject, an injunction was granted till the hearing, by the House of Lords, upon appeal, to restrain a lessee from digging sand and gravel, in violation of a covenant, secured by a penalty.⁶

A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance; the lessee made an under lease, omitting any such stipulation, and the under lessee commenced the business of rectifying highwines. Upon a bill filed by the lessor against the lessees, the Court restrained the parties from continuing to rectify highwines, or carry on any other business that would interfere in any way with the insurance.⁷

In 1844, a mill site was conveyed to the defendant "with the privilege of keeping the dam thereon at all times hereafter at its present head or height, but no higher," and in 1849 the defendant

1 *Attwood v. Banks*, 2 Beav. 192; see *Pin v. Wilson*, 2 Phill. 653.

2 *Jannison v. Teague*, 3 Jur. N. S. 1206, V. C. W.

3 *Earl Bathurst v. Borden*, 2 Bro. C. C. 64; *Lord Kilmorey v. Thackeray*, cited *ib.* 65. As to proceedings in Equity, in disputes between landlord and tenant, see *Woodfall*, 894, *et seq.*

4 *Johnson v. Goldswaine*, 3 Anst. 749; *Geant v. Lord Belfast*, *ib.* n.; *Pulteney v. Shelton*, 5 Ves. 147; *ib.* 200, n. (a); *Lord Grey de Wilton v. Saxon*, 6 Ves. 106.

5 *Aylet v. Dodd*, 2 Atk. 238; *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Bro. P. C. ed. Toml. 430.

6 *City of London v. Pugh*, 4 Bro. P. C. ed. Toml. 306.

7 *Arnold v. White*, 5 Grant, 371.

erected a new dam lower down the stream. This new dam was of the same height as the old dam ; but the defendant placed on the dam moveable stop logs to enable him to make use of the surplus water, which would otherwise flow over the dam. By experiments, it was shown that if these stop logs were not removed when the defendant's mill was not working, but in that case only, the water would be raised on the lands of the plaintiff, to the extent of about $1\frac{1}{2}$ inches ; the defendant however always had removed the logs when his mill was not working: *Held*, that the plaintiff was not entitled to an absolute injunction against the use of the stop logs.¹

Though a lessee is required, by law, to cultivate the lands demised to him in a husbandman-like manner, conformable to the custom of the country,² yet this is usually defined by some express covenant. It has, upon this subject, been determined at Law, that a covenant to occupy in a good and husbandman-like manner, according to the custom of the country, will be broken by contravening the prevalent course of husbandry in the neighbourhood ; and that, even if the contract be simply to occupy the estate in a good and husbandman-like manner, this will throw a liability upon the tenant to cultivate the land according to the practice of the neighbourhood ;³ and even, though a farm be held under a written agreement, the custom of the neighbourhood may well be insisted upon, provided it be not either expressly or by implication excluded by the terms of the agreement.⁴ The same principle has been acted upon in Equity, where an injunction has been granted to restrain a tenant from year to year, (who, it was said, was equally bound as a tenant for a longer period, to manage his farm in a husbandman-like manner,) from removing crops, manure, &c., contrary to the custom of the country.⁵ In a previous case, a tenant was restrained from ploughing up pasture land : although the lease did not contain an express covenant not to convert pasture into arable ; but the landlord was held entitled to the injunction, on the ground of there being a covenant to manage pasture in a

1 *Beamish v. Barrett* (in appeal), 16 Grant, 318 ; and see *Graham v. Burr*, 4 Grant, 1 ; and *Campbell v. Young*, 18 Grant, 97.

2 *Powley v. Walker*, 6 T. R. 373.

3 *Legh v. Hewett*, 4 East, 164.

4 *Wyllenworth v. Dallison*, Doug. 201 ; *Senior v. Armytage*, 1 Holt, N.P.C. 197 ; *Webb v. Plummer*, 2 B. & Ald. 740.

5 *Onslow v. —*, 10 Ves. 173.

husbandman-like manner.¹ Upon the same principle, the Court has interfered to restrain a tenant from sowing mustard, saffron, woad, and other deleterious crops : as being contrary to the course of husbandry.²

A distinction has been made, as to enforcing, by injunction, the specific performance of express covenants, and of implied agreements ; and the Court has refused to interfere to restrain a tenant, who was holding over, from removing articles contrary to the custom of the country : as the Court would not imply special covenants, as to cultivation, from the mere act of holding over.³

A covenant to repair, and, at the end of the term, to surrender buildings in good condition, does not preclude an injunction against pulling them down and carrying away the materials, just before the end of the term.⁴

Where there is a covenant not to convert premises into a shop, or to carry on a trade without licence in writing, the permission of the lessor, without writing, to carry on one trade, will not amount to a general licence for any trade, so as to preclude the lessor from his right to an injunction.⁵

It appears formerly to have been considered, that the Court should not, in any case, interfere to restrain the breach of an agreement, if it was of such a character that it could not decree the specific performance of it.⁶ But it seems that now, the Court will restrain a person from committing acts, in breach of an agreement, although it cannot compel the performance of it ;⁷ and that where an agreement consists of two distinct parts, one of which the Court can enforce, although it cannot enforce the other, and the bill is filed simply for an injunction to restrain the violation of the

¹ *Drury v. Molins*, 6 Ves. 328.

² *Pratt v. Brett*, 2 Madd. 62.

³ *Kimpton v. Eve*, 2 V. & B. 349.

⁴ *Mayor, &c., of London v. Hedger*, 18 Ves. 355.

⁵ *Macher v. Foundling Hospital*, 1 V. & B. 188.

⁶ *Keable v. Kean*, 6 Sim. 333 ; *Kimberley v. Jennings*, 6 Sim. 340 ; *Baldwin v. Useful Knowledge Society*, 9 Sim. 398 ; 2 Jur. 961 ; *Hooper v. Brodrick*, 11 Sim. 47 ; *Pickering v. Bishop of Ely*, 2 Y. & C. C. 249 ; 7 Jur. 479 ; *Stocker v. Wedderburn*, 3 K. & J. 393 ; *Dietrichsen v. Cabburn*, 2 Phill. 52 ; 1 C. P. Coop. t. Cott. 72 ; 10 Jur. 601 ; *Hills v. Croll*, 2 Phill. 60 ; 9 Jur. 645 ; 1 C. P. Coop. t. Cott. 83.

⁷ *Lunley v. Wagner*, 5 De G. & S. 485 ; 1 De G. M. & G. 604 ; 16 Jur. 871 ; *Great Northern Railway v. Manchester, Sheffield & Lincolnshire Railway*, 5 De G. & S. 188 ; *Webster v. Dillon*, 3 Jur. N. S. 432, V. C. W.

former part, the Court will grant the injunction, notwithstanding that it could not enforce the agreement *in toto*.¹

An agreement may be enforced by injunction, although the violation is not shown to be injurious;² and the Court will not, it seems, refuse to interfere, on the ground that a mistake has been committed by both parties in the form of the covenant; on the ground that the plaintiff has permitted other infringements of the covenant; or on the ground of inconvenience to the public.³

Injunctions may also be granted, to relieve a party against the consequences of the non-performance of a covenant or agreement, where such consequences involve either a forfeiture or the imposition of a penalty.

The doctrine upon the subject of relief from penalties, has thus been stated by Lord Thurlow:—"Where a penalty has been inserted, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only is accessional, and to secure the damage really incurred."⁴ But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the non-performance of the agreement, a Court of Equity (except in certain cases of waste, which will be noticed hereafter,) refuses to interfere in restraining the recovery of such damages.⁵

Upon these principles, Courts of Equity interpose to restrain proceedings at Law for the recovery of penalties. But where a forfeiture had happened under a by-law of a corporation, which provided that members should receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent, Sir William Grant refused to relieve: although the lapse arose from accidental circumstances, and absence from town when the notice was sent; and he mentioned a case, in Ireland, of

1 *Rolfe v. Rolfe*, 15 Blm. 88. See *Ogden v. Fossick*, 11 W. R. 128, L. J.J.; but see *Brett v. East India & London Shipping Company*, 2 H. & M. 404.

2 *Dickenson v. Grand Junction Canal*, 15 Beav. 200; but see *Lloyd v. London, Chatham & Dover Railway Company*, 11 Jur. N. S. 380; 13 W. R. 698, L. J.J.

3 *Ibid.*

4 *Stoman v. Walter*, 1 Bro. C. C. 418.

5 On this point see 1 *Sloanst*, 318, n.; *Saintier v. Ferguson* 1 McN. & G. 236; 14 Jur. 255; *Coles v. Sims*, 5 De G. M. & G. 1; 13 Jur. 683, 685.

a person who, after having paid some instalments on a lease, neglected to make a further payment, and forfeited the instalments he had paid.¹ And though relief has sometimes been given against the forfeiture of a covenant for renewal,² which, in Ireland, formed a distinct head of local Equity,³ yet the inclination of the Courts is to the contrary: unless the right has been forfeited, in consequence of fraud, accident, mistake, or any similar Equity.⁴

A common instance of this species of relief is that which is given against a clause of re-entry for non-payment of rent. This has been a ground of equitable interference from the earliest times; and there has been a parliamentary recognition of the doctrine by Statute 4 Geo., II., ch. 28, sections 2 and 3. This relief is granted upon the principle that compensation is made to the landlord by the payment of the rent with interest: a doctrine contradicted by general experience, and often found fault with as imperfect and unjust.⁵

Lord Northington appears to have been of opinion, that the Court might, by analogy, relieve, where a tenant had committed a forfeiture by cutting down timber.⁶ It is, however, scarcely necessary to remark how extremely inadequate pecuniary compensation must generally be in such a case; and it is probable, if the question is ever maturely considered, that a contrary determination will be come to.

Where it is clear that the covenant is of such a nature that a Court of Equity cannot make a compensation for the breach of it, as in the case of covenants not to assign without licence,⁷ relief will not be given against the penalty. Considerable discussion has taken place, how far the Court would relieve against a forfeiture incurred by the breach of a covenant to repair. In the case of

1 *Sparks v. Liverpool Water Works Company*, 13 Ves. 428.

2 *Rawstorne v. Bently*, 4 Bro. C. C. 415.

3 *O'Neil v. Jones*, 1 Ridg. 170; *Kane v. Hamilton*, ib. 180; *Bateman v. Murray*, ib. 187; *Boyle v. Lyons*, ib. 384; Vern. & Scriv. 135; *Magrath v. Lord Muskerry*, ib. 166; 1 Ridg. 459; *Jackson v. Saunders*, 1 Sch. & Lef. 448; 2 Dow. 437; *Lennon v. Napper*, 2 Sch. & Lef. 682; *Magrane v. Archbold*, 1 Dow. 107; *Earl of Mountnorris v. White*, 2 ib. 459; *Barrett v. Burke*, 5 ib. 1; *Keatid v. Sparrow*, 1 Ball. & B. 367; *Jessop v. King*, 2 ib. 81; *Barrett v. Pearson*, ib. 189.

4 *Allen v. Hilton*, 1 Fonb. Eq. 432; *Bayley v. Corporation of Leominster*, 3 Bro. C. C. 529; *Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, ib. 690; *City of London v. Mitford*, 14 Ves. 41.

5 *Hils v. Barclay*, 16 Ves. 402, 405; 18 Ves. 56, 61; *Bracebridge v. Buckley*, 2 Pri. 216; *Reynolds v. Pitt*, 19 Ves. 134, 140.

6 *Northcote v. Duke*, 2 Eden, 319, 322; *Amb. 511*.

7 *Waser v. Mocato*, 9 Mod. 112; *Woodfall*, 525-532.

Sanders v. Pope,¹ Lord Erskine, upon the authority of a determination of Lord Macclesfield,² expressed a strong opinion in favour of the equitable jurisdiction; but the doctrine, after full and elaborate discussion, has been established to the contrary.³ The same determination would, consequently, be made with respect to the breach of a covenant to build: though the authorities are conflicting as to the power to decree a specific performance in such case.⁴

Where the forfeiture of the lease at Law is admitted, the tenant must show reasonable ground for belief that he is entitled to equitable relief, before an interlocutory injunction will be granted to restrain the landlord from proceeding to enforce the forfeiture. It seems, also, that where the landlord is aware that the lease is or must be forfeited, but stands by and allows the tenant to expend money on the property, he will be restrained from proceeding to enforce the forfeiture at Law.⁵

Injunctions or restraining orders may also be issued, for the protection of a ward of Court from removal,⁶ or marriage;⁷ in cases of interpleader;⁸ and to restrain a partner from acting in opposition to the partnership agreement, or from depreciating the partnership property.⁹

Courts of Equity will likewise prevent a person from setting up an unconscientious advantage at Law, so as to interpose impediments to the just rights of the other party. Thus, if an ejectment

1 12 Ves. 282.

2 *Hack v. Leonard*, 9 Mod. 91.

3 *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 56; *Bracebridge v. Buckley*, 2 Pri. 200; *Nokes v. Gibbes*, 3 Drew. 681; 3 Jur. N. S. 728; *Nokes v. Fish*, 3 Drew. 735; *Job v. Baniater*, 2 K. & J. 374; 3 Jur. N. S. 93, L. C.; and see *Hannan v. South London Waterworks Company*, 2 Mer. 65, n.

4 There are two instances of specific performance decreed of covenants to rebuild: *City of London v. Nash*, 3 Atk. 512; 1 Ves. S. 12; *Allen v. Harding*, 2 Eq. Ca. Ab. 17, pl. 6; and, in *Moerly v. Virgin*, 3 Ves. 184, Lord Rosslyn stated that specific performance might be decreed. Lords Thurlow and Kenyon, on the other hand, have pronounced a contrary opinion: *Errington v. Aynesh*, 2 Bro. C. C. 341; *Lucas v. Commerford*, 3 Bro. C. C. 166; 1 Ves. J. 235. That a covenant to repair cannot be specifically performed, see *Rayner v. Stone*, 2 Eden, 128; *Flint v. Brandon*, 8 Ves. 169. And see *Brace v. Wehnert*, 25 Beav. 848; 4 Jur. N. S. 549; *Sanderson v. Cockermonth Railway Company*, 11 Beav. 497; *Lytton v. Great Northern Railway Company*, 2 K. & J. 394; 2 Jur. N. S. 486; *Soames v. Edge*, Johns. 669; *Norris v. Jackson*, 1 J. & H. 319; *Taylor v. Perington*, 7 De G. M. & G. 328; *Samuda v. Lawford*, 4 Giff. 42; *Fry*, 21; *Woodfall*, 477, as to specific performance of covenants of this nature.

5 *North Staffordshire Steel Company v. Camoys*, 11 Jur. N. S. 555, L.J.J.

6 See *ante*. For cases, and forms of orders, see *Seton*, 713-721.

7 *Ante*. For cases, and forms of order, see *Seton*, 727-732; and see *Pearce v. Crutchfield*, 14 Ves.

8 *Ante*. For cases, and forms of orders, see *Seton*, 962, 963.

Hall v. Hall, 12 Beav. 414, 419; 20 Beav. 139; *Marshall v. Watson*, 25 Beav. 501, 504; *Turner v. Major*, 3 Giff. 442; *Bradbury v. Dickens*, 27 Beav. 53; and for cases, and for forms of orders, see *Seton*, 917, 918.

is brought to try a right to land, the Court of Chancery will restrain the party in possession from setting up a term of years, or other interest, in a trustee, lessee, or mortgagee which may hinder the fair trial of the right;¹ but this will not be done in every case: for, as the Court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage, if there is any circumstance which meets this principle, the Court will not interfere. Therefore, if the possessor is a purchaser for valuable consideration, without notice of the title of the claimant, this is a title, in conscience, equal to that of the claimant; and the Court will not restrain the possessor from using any advantage he may be able to gain to defend his possession.²

Where repeated attempts are made to litigate the same question, which the Courts of ordinary jurisdiction will, in many cases, admit, the Court of Chancery will put an end to the oppression which may be occasioned by the abuse of this privilege. Thus, as a judgment in ejectment is not final or conclusive, but the same proceedings may be repeated for ever, a perpetual injunction will be granted, to prevent the repetition of them, when the assertion of such right becomes oppressive to the opposite party.³ It is on this ground that Courts of Equity have interfered, by bills of peace.

The object of an interlocutory injunction is to maintain the matters in question in the suit *in statu quo*, until the hearing of the cause;⁴ and the Court, will not, therefore, except under very special circumstances, grant, upon an interlocutory application before decree, an injunction which virtually directs the defendant to perform an act.⁵ There is, indeed, a passage in the MS. report of the case of *Worden v. Ellers*,⁶ from which it may be inferred to have been Lord Hardwicke's opinion that the Court might, upon

1 *Ld. Red.* 184; *Bond v. Hopkins*, 1 Sch. & Lef. 412, 430; *Pulteney v. Warren*, 6 Ves. 89; *Leigh v. Leigh*, 1 Sim. 349.

2 *Jerrard v. Saunders*, 2 Ves J. 454, 457, 458; *Maundrell v. Maundrell*, 7 Ves. 567: 10 Ves. 246; *Baker v. Mellish*, *ib.* 544, 549; *Hylton v. Morgan*, 6 Ves. 293; *Byrne v. Byrne*, 2 Sch. & Lef. 537; *Barney v. Luckett*, S. & S. 419; *Northey v. Pearce*, *ib.* 420.

3 *Lord Bath v. Sherwin*, Prec. in Ch. 261; 4 Bro P. C. ed. Toml. 373; *Leighton v. Leighton*, 11 P. Wms. 671: 4 Bro. P. C. ed. Toml. 378; *Devonshire v. Neirenham*, 2 Sch. & Lef. 199, 211; *Hodgson v. Duce*, 2 Jur. N. S. 1014, V. C. S.

4 *Lawrence v. Austin*, 11 Jur. N. S. 576, 577: 13 W. R. 981, M. R.

5 *Blakenmore v. Glamorganshire Canal Company*, 1 M. & K. 154; *Great Western Railway Company v. Birmingham & Oxford Railway Company*, 2 Phill. 297: 12 Jur. 106; *Shrewsbury & Chester Railway Company v. Shrewsbury & Birmingham Railway Company*, 1 Sim. N. S. 410: 15 Jur. 548.

6 18 Dec. 1739; 6 *Sergt. Hill's MSS.* 2; and 12 *ib.* 76; *Eden on Inf.* 190.

motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff; and there is an early case in *Tothill*, of an order to show cause why a defendant, who had ploughed up ancient pasture land, should not lay it down again in grass.¹ The contrary doctrine is, however, now firmly established. In the case of *Ryder v. Bentham*,² Lord Hardwicke, upon a motion for an order to pull down certain scaffolding, observed, that he never knew an order to pull down anything, made on motion. Lord Thurlow, in a subsequent case, upon a motion to restrain a party from digging a ditch, and to compel him to put everything in the same state in which it was before by filling up so much as he had already dug, refused the latter part of the motion.³ So, in another case, Lord Eldon refused an order, specifically to repair the banks of a canal, stop gates, and other works.⁴ In the case of *Hooper v. Brodrick*,⁵ an injunction was granted, *ex parte*, restraining the defendant from discontinuing to use certain premises as an inn: but was dissolved, upon the ground that there was no jurisdiction to restrain a person from not keeping an inn: which is the same in effect as ordering him to keep one.

But though the Court will not, directly and in terms, compel the performance of an act upon motion, yet there are many cases in which the effect may be indirectly obtained by an order merely restrictive. Thus, in the case of *Robinson v. Lord Byron*,⁶ the effect was obtained by an injunction restraining the defendant from preventing the water from flowing in such regular quantities as it had ordinarily done, before the day on which the alleged nuisance commenced. In *Lane v. Newdigate*,⁷ a similar effect was obtained, by restraining the defendant from impeding the plaintiff from navigating, using, and enjoying a canal, by continuing to keep the canal, banks, or works out of repair, by diverting the water, or preventing it, by the use of locks, from remaining in the canal, or by continuing the removal of a stop-gate.

1 *Rolls v. Miller*, Toth. 144.

2 *Anon.*, 1 Ves. J. 140.

3 11 Sim. 47.

4 1 Bro. C. C. 588; and see *Hervey v. Smith*, 1 K. & J. 889.

5 10 Ves 192; and see *Rankin v. Huskisson*, 4 Sim. 18; *Blackmore v. Glamorganshire Canal Navigation*, 1 M. & K. 154; *Spencer v. London & Birmingham Railway Company* 8 Sim. 193; *Goodale v. Goodale*, 16 Sim. 316; *Shrewsbury & Chester Railway Company v. Shrewsbury & Birmingham Railway Company*, 1 Sim. N. S. 410; 15 Jur. 548; *Whittaker v. Howe*, 3 Beav. 333, 339; *Ranken v. East & West India Docks Railway Company*, 12 Beav. 298, 305; *Greatrex v. Greatrex*, 1 De G. & S. 692; 11 Jur. 1052; *Lumley v. Wayner*, 1 De G. M. & G. 604; 16 Jur. 871; 5 De G. & S. 485; *Ilsenbergh v. East India House Company*, 10 Jur. N. S. 221, L. C.; and *Seton*, 938, 937.

2 1 Ves. S. 543.

4 *Lane v. Newdigate*, 10 Ves. 192.

Interlocutory Injunctions and Restraining Orders.

An injunction may be obtained at any time, in vacation as well as in term, and whether the Court be sitting or not;¹ and at almost every stage of the cause.² An application for an interlocutory injunction³ should, however, be made without delay: as it may be refused, if there has been any delay or acquiescence on the part of the plaintiff.⁴

An interlocutory injunction is merely a mode by which the Court preserves the property in dispute, with the least injury to all parties, until it can finally determine their respective rights.⁵ And it will not be granted, in a doubtful case, to restrain the commission of an act for which, if wrongful, ample compensation can be obtained in damages⁶ at the hearing of the cause, while, by granting an injunction, serious injury would be inflicted on the party sought to be restrained, nor will the Court interfere, by injunction, between the parties to a contract the specific performance of which it would refuse to decree.⁷ Where the rights of the parties are doubtful, the Court will, on an application for an interlocutory injunction, consider the comparative injury which will result from granting or withholding the injunction,⁸ as well as the justice of the case as it appears on the evidence.⁹

On an application on behalf of the Crown for a special injunction, it appeared that the acts and threats complained of occurred eight

1 *Temple v. Bank of England*, 6 Ves. 770.

2 *Bacon v. Jones*, 4 M. & C. 433, 436: 3 Jur. 994.

3 *Ante*.

4 *Gordon v. Cheltenham Railway Company*, 6 Beav. 229, 237; *Buzon v. James*, 5 De G. & S. 80, 84: 16 Jur. 15; *Attorney-General v. Eastlake*, 11 Hare, 206: 17 Jur. 801; *Coles v. Sims*, Kay, 66, 70; 5 De G. M. & G. 1; 18 Jur. 638, 685; *Great Western Railway Company v. Oxford, Worcester & Wolverhampton Railway Company*, 3 De G. M. & G. 341, 359; *Attorney-General v. Sheffield Gas Company*, ib. 304, 327: 17 Jur. 667, 680; *Attorney-General v. Luton Board of Health*, 2 Jur. N. S. 150, V. C. W.; *Cooper v. Hubbard*, 30 Beav. 160: 7 Jur. N. S. 457; *Wintle v. Bristol and South Wales Railway Company*, 10 W. R. 210, V. C. W. As to the principles on which interlocutory injunctions are granted, see also *Attorney-General v. Corporation of Liverpool*, 1 M. & C. 171, 210; *Greenhalgh v. Manchester & Birmingham Railway Company*, 3 M. & C. 784, 791; *Bacon v. Jones*, 4 M. & C. 334, 436: 3 Jur. 994; *Williams v. Earl of Jersey*, C. & P. 91, 96; *Hilton v. Earl Granville*, ib. 283, 292: 4 Beav. 130; *Pidding v. How*, 8 Sim. 477; *Spottiswoode v. Clarke*, 2 Phill. 164: 1 C. P. Coop. t. Cott. 254: 10 Jur. 1043; *Pinohin v. London & Blackwall Railway Company*, 5 De G. M. & G. 851: 1 Jur. N. S. 241; *Wood v. Sutcliffe*, 2 Sim. N. S. 163: 16 Jur. 75; *Johnson v. Wyatt*, 2 De G. J. & S. 18: 9 Jur. N. S. 1333; *Lawrence v. Austin*, 11 Jur. N. S. 576, 577: 13 W. R. 981, M. R.

5 *Lawrence v. Austin*, 11 Jur. N. S. 576, 577: 13 W. R. 981, M. R.

6 See *ante*.

7 *Garrett v. Banstead & Epsom Downs Railway Company*, 11 Jur. N. S. 591: 13 W. R. 878, L.J.J.; *Munro v. Wivenhoe & Brightlingsea Railway Company*, 11 Jur. N. S. 612: 13 W. R. 880, L.J.J.

8 *Hadley v. London Bank of Scotland*, 11 Jur. N. S. 554: 13 W. R. 978, L.J.J.

9 *Garrett v. Banstead & Epsom Downs Railway Company*, 11 Jur. N. S. 591: 13 W. R. 878, L.J.J.; *Munro v. Wivenhoe & Brightlingsea Railway Company*, 11 Jur. N. S. 612: 13 W. R. 880, L.J.J.

and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in. *Held*, that the application was too late.¹

Where a bill was filed to restrain proceedings by a Township Council on a resolution which named, it was alleged, a higher rate than was necessary to raise the sum required for county purposes, and the plaintiff allowed a term of the Common Law Courts to pass before moving for an injunction, it was *held* :—following the decision in *Carrol v. Perth*, 10 Grant 64—that he came too late :—the proper course in such a case being to move at law to quash the resolution or by-law.² Where the plaintiff's title was disputed, and the injury of which he complained had been going on for three years, and was not any greater at the time the plaintiff moved for an interlocutory injunction than it had been for three years before ; the Court refused the motion.³

Where to an action on a bond for the rents of certain market dues and fees, fraud &c., were pleaded, and upon the trial a verdict passed against the defendants, who, after execution had been issued, filed a bill in this Court for the purpose of having the bond declared void on the ground of fraud &c., and for an injunction restraining proceedings on the execution ; to this bill the defendants in equity put in an answer denying the allegations of fraud, whereupon the plaintiffs amended their bill, introducing further charges of fraud, filed affidavits verifying these further charges, and moved for the injunction prayed by their bill ; the motion was refused with costs.⁴

Where the nature of the act to be restrained is such that an immediate stoppage of it is absolutely necessary, to protect property from destruction, or where the mere act of giving notice to the defendant, of the intention to make the application, might be, of itself, productive of the mischief apprehended, by inducing him to accelerate the act, in order that it might be complete before the time for making the application should have arrived, the Court will award the injunction without notice, or even before service of

¹ *Attorney-General v. McLaughlin*, 1 Grant 34.

² *Grier v. St. Vincent*, 12 Grant, 330.

³ *Rich v. Brantford*, 14 Grant, 83.

⁴ *Walker v. The City of Toronto*, 1 Grant, 502.

the copy of the bill;¹ but the Court is more strict, in requiring the facts to be fully stated, on an application made *ex parte*, than on an application made on notice, and upon which the other side does not appear.² Where an injunction has been granted on an *ex parte* application, it will be dissolved, without regard to the merits, if any material facts have been suppressed.³

An *ex parte* injunction will be granted to restrain the negotiation of a bill of exchange, where it has been fraudulently or improperly obtained; for, as it would be a good bill of exchange, and, therefore, a negotiable instrument in the hands of a *bona fide* holder, the plaintiff has a right to be protected from that danger, and the mischief attending it.⁴ An injunction will also be granted to prevent the personal representative of a testator from receiving the assets, when he is either insolvent, or wasting the property in such a manner that there is a great danger of its being lost: although, to induce the Court to interfere against an executor, a strong special ground must be made.⁵ An *ex parte* injunction will likewise be ordered, in suit for specific performance, to restrain a vendor, who has contracted to sell his property to another, from conveying away the legal estate in the premises.⁶

Ex parte injunctions have also been issued, in cases of obstruction of ancient lights;⁷ and in many other cases, where the danger to the interest of the party applying was imminent. Thus, where a foreign vessel was driven into Plymouth by stress of weather, Lord Eldon, at the instance of the supercargo and part owner, granted an injunction to prevent the master from selling the ship's cargo, till answer or further order, upon an affidavit that he had heard the captain was about to do so, and on certificate of bill filed.⁸ And an *ex parte* injunction was granted, in like manner, to restrain the proprietor of a coach, who had sold the goodwill of his

1 See Seton, 871. For form of order, see *ib.* 867.

2 *McLaren v. Stainton*, 16 Beav. 279, 290.

3 *Hilton v. Earl Granville*, 4 Beav. 130; C. & P. 283; *Clifton v. Robinson*, 16 Beav. 355; *Hemphill v. McKenna*, 3 Dr. & War. 188; *Spurgeon v. Hooker*, 1 De G. & S. 484; *Castelli v. Cook*, 7 Hare, 89, 94; 13 Jur. 675; *Dalglish v. Jarvie*, 2 M.N. & G. 231; 14 Jur. 945; *Pinchin v. London & Blackwall Railway Company*, 5 De G. M. & G. 851; 17 Jur. 241; *Phillips v. Prichard*, 1 Jur. N. S. 750, V. C. W.; *Fuller v. Taylor*, 9 Jur. N. S. 743; 11 W. R. 632, V. C. W.

4 *Patrick v. Harrison*, 3 Bro. C. C. 476; — *v. Blackwood*, 3 Anst. 851; *Smith v. Haytwell*, Amb. 66; *Hood v. Aston*, 1 Russ. 412; *Lloyd v. Gurdon*, 2 Swanst. 180; *ante*.

5 *Middleton v. Dodswell*, 13 Ves. 296; *Mansfield v. Shaw* 3 Madd. 100.

6 *Echtf v. Baldwin*, 16 Ves. 267; *ante*.

7 *Attorney-General v. Nichol*, 16 Ves. 338; *Back v. Stacy*, 2 Russ. 121. For cases on this subject, see *ante*.

8 *De lafield v. Guanabeus*, MSS. 26 March, 1809.

business, and undertaken not to set up another coach on the same road, from running a coach contrary to his undertaking.¹ So also, where the representatives of a mortgagor had obtained the mortgage deeds from the mortgagee, by fraud, Lord Eldon, upon affidavit and certificate of bill filed, granted an injunction to restrain the defendants from selling or mortgaging the estate ; and ordered the deeds to be brought into Court immediately.²

It sometimes happens that, upon an application, *ex parte*, for an injunction, the Court will, if it thinks that the case is not so urgent as to require its immediate interference, or that the affidavits in support of it are not positive enough, order notice of the application to be given to the defendant.³

It is not usual now to grant an injunction, on an *ex parte* application. The general practice, in such cases, is to grant what is called an interim order : by which the defendant is restrained, until after a particular day mentioned : liberty being given to the plaintiff to serve notice for an injunction for the day before such day. The plaintiff is also required to give an undertaking to abide by the order of the Court, as to any damages the defendant may be put to by reason of the interim order ; and such other terms are imposed upon him as the nature of the case may require.⁴ The undertaking is ordinarily given through counsel, and forms part of the order ; but where the order is granted in vacation, without the attendance of counsel, the undertaking is inserted in the Registrar's book, and signed by the plaintiff or his solicitor.⁵ Where a limited company is the plaintiff, the undertaking must be given by some responsible person.⁶ The undertaking is irrespective of the suit ; and is, therefore, not vacated by the bill being subsequently dismissed.⁷

1 *Williams v. Williams*, 2 Swanst. 253 ; *ante*.

2 *Wallis v. Willis*, MSS. Nov., 1802.

3 See *Lord Byron v. Johnston*, 2 Mer. 29.

4 *Chappell v. Davidson*, 3 De G. M. & G. 1 : 2 K. & J. 123 ; *Ingram v. Stiff*, 5 Jur. N. S. 947, L.J.J. ; *Tuck v. Silver*, Johns. 218 ; *Adamson v. Wilson*, 10 L. T. N. S. 24, V. C. W. ; *Wakefield v. Duke of Buccleugh*, 11 Jur. N. S. 523 : 13 W. R. 856, V. C. K. ; and see *Whaley v. Brancker*, 10 Jur. N. S. 536 : 12 W. R. 570, 595, V. C. K. ; *Seton*, 870. For forms of orders, see *ib.* 867.

5 *Seton*, 870. For form of order in such case, see *ib.* 867, No. 3.

6 *Anglo-Danubian Company (Limited) v. Rogerson*, 10 Jur. N. S. 87, M. R.

7 *Newby v. Harrison*, 7 Jur. N. S. 981 : 9 W. R. 849, L.J.J. ; overruling S. C. 1 J. & H. 678 ; and see, as to the undertaking and assessment of damages, *De Mattos v. Gibson*, 1 J. & H. 79 : 7 Jur. N. S. 282 ; *Southworth v. Taylor*, 28 Beav. 616 ; *Bingley v. Marshall*, 11 W. R. 1018, V. C. W. For form of order for inquiry as to damages, see *Seton*, 868, No. 5.

The application for an injunction is made by motion.¹ If it is not made *ex parte*, a notice of motion must be served in the usual manner;² and if it is intended to serve the notice of motion before the expiration of the time limited for the appearance of the defendant, or to make the application on short notice, the special leave of the Court must be first obtained; and the fact that it has been given must be stated in the notice of motion.³ Leave will be given to serve the notice of motion with the copy of the bill; but not to serve it before the bill is filed.⁴

Strictly speaking, after the defendant has appeared, a notice of motion should always be given; but in cases of urgency, where the threatened mischief is imminent, and would be irremediable, this will be dispensed with.⁵

An application for an injunction must (except in the case of a bill of interpleader),⁶ be supported by affidavits, or the admissions of the defendant in his answer. Formerly, the answer was taken to be true; and affidavits, except under special circumstances, could not be read against it;⁷ but now, in applications for an injunction, or to dissolve an injunction, the defendant's answer is, for the purpose of evidence on such application, to be regarded merely as an affidavit of the defendant; and affidavits may be received and read in opposition thereto.⁸

The affidavits in support of an application for an injunction are usually made by the plaintiff; but they may be made by any person acquainted with the facts. Thus, an injunction was granted to restrain the publication of a work sold as the plaintiff's upon an affidavit by the plaintiff's agent: the plaintiff himself being abroad.⁹

1 It may also be made by petition; but this is not done in modern practice. As to motions, see *ante*. It is said that, in vacation, the application should be made by petition: *Wyatt's P. R.* 252; *Smith v. Clarke*, 2 Dick. 455; *Nichols v. Kearsley*, *ib.* 645; but this is not the present practice.

2 *Ante*.

3 *Ransbottom v. Freeman*, 4 Beav. 145; *Hill v. Rimell*, 2 M. & C. 641; *Jacklin v. Wilkins*, 6 Beav. 607; *Moggridge v. Thomas*, 2 C. P. Coop. t. Cott. 165; *Newton v. Chorlton* 10 Hare, App. 31; and see *ante*.

4 *Simmons v. Heavyside*, 22 Beav. 412; *contra*, *Parker v. Great Northern Railway Company*, 4 De G. & S. 138; *Fosbrook v. Woodcock*, 12 Jur. 956, V. C. E.

5 *Marasco v. Boulton*, 2 Ves. S. 112; *Aller v. Jones*, 15 Ves. 605; *Harrison v. Cockerell*, 3 Mer. 1; *Collard v. Cooper*, 6 Mad. 190; *Perry v. Weller*, 3 Russ. 519; *Acraman v. Bristol Dock Company*, 1 R. & M. 321; *Petty v. Eastern Counties Railway Company*, 3 Sim. 433; *Langham v. Great Northern Railway Company*, 1 De G. & S. 486, 497.

6 *Hamilton v. Marks*, 5 De G. & S. 638; and see *ante*.

7 See *Roe v. Mathews*, 2 De G. & S. 227, 234; *Custance v. Cunningham*, 13 Beav. 363.

8 15 and 16 Vic. ch. 86, sec. 59 (Imperial); but we have no provision similar to this.

9 *Lord Byron v. Johnston*, 2 Mer. 29; but see *Mollett v. Enequist*, 25 Beav. 600; 4 Jur. N. S. 1009.

The affidavits must be sworn after the bill is filed : otherwise they cannot be read, as they have not been made in a cause.¹ The office copies of the affidavits ought to be in Court at the time when the injunction is moved for ; and an injunction has been dissolved on the ground that the office copies of the affidavits, upon which it was granted, were not actually in Court when the order was pronounced.²

It is, in general, necessary that a plaintiff should swear positively to his title. An injunction has been refused when a plaintiff merely swore, upon his information and belief, that he was a remainderman under a settlement.³ A statement that the plaintiff is entitled in fee simple has also been considered insufficient, as being too general : he must set out his title particularly.⁴

Upon the same principle, it is required that, where an application to restrain the violation of a patent right is made *ex parte*, or the validity of the patent is denied, the plaintiff should swear as to his belief at the time of making the application, (and not as to his belief at the time he obtained the patent,) that he is the original inventor.⁵

The evidence must also prove some actual violation of the plaintiff's rights, or a sufficient ground to apprehend it. Thus, in cases of waste, an affidavit merely as to belief that the defendant intends to commit waste, without stating any grounds for it, will not be sufficient : there must either be some fact, like the sending a surveyor to mark out trees, or some threat ;⁶ and where the application relates to a matter which is merely pecuniary, the Court must be satisfied that there is some probability of the bill not being dismissed at the hearing.⁷

The affidavits on which an *ex parte* injunction is applied for must (to guard against abuse of that process) present a candid

1 *Francombe v. Francombe*, 11 Jur. N. S. 123 : 13 W. R. 355, L. C. ; *contra*, *Fennall v. Brown*, 18 Jur. 1051, V. C. W.

2 *Jackson v. Cassidy*, 10 Sim. 326 ; *Elsay v. Adams*, 4 Giff. 398 : 9 Jur. N. S. 788, V. C. S.

3 *Davies v. Leo*, 6 Ves. 784.

4 *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57.

5 *Hill v. Thompson*, 3 Mer. 622, 624 ; *Sturz v. De La Rue*, 5 Russ. 322, 328 ; *Whitton v. Jennings*, 1 Dr. & Sim. 110 : S. C. *nom. Whitten v. Jennings*, 6 Jur. N. S. 184 ; *Mayer v. Spence*, 1 J. & H. 87 ; *ante*.

6 *Gibson v. Smith*, 2 Atk. 182 ; *Jackson v. Cator*, 5 Ves. 638 ; *Hanson v. Gardiner*, 7 Ves. 305, 309 : *Etches v. Lance*, *ib.* 417 ; *Hannay v. M'Entire*, 11 Ves. 54 ; and see *Bird v. Lake*, 1 H & M. 111.

7 *Attorney-General v. Mayor, &c., of Wigan*, 5 De G. M. & G. 52 : 18 Jur. 299, 300.

statement of the whole case, and must set forth not only the facts which the plaintiff thinks to be material, but such as are in truth material to the determination of the application: an injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits.¹

In moving for an injunction *ex parte*, the affidavits on which the application is founded must set forth the facts and circumstances material for the Court to know, or the injunction will be dissolved, even although the party moving did not consider the circumstances to be material.² A motion for an injunction was refused, the allegation and prayer of the bill having been framed with a view to relief on other grounds than those on which the application was founded, although the affidavits in support of it contained sufficient to warrant the Court in granting the injunction.³ An *ex parte* injunction will be dissolved, if material facts be suppressed, or misrepresented to the Court, on moving it.⁴

Order 285 provides that, "On motion to obtain or dissolve a special injunction, affidavits may be used to support or contradict the answer."

Although the Court had refused to grant an *ex parte* injunction to restrain the removal of certain chattels claimed by the plaintiff, and directed notice of motion to be given, an interim injunction was subsequently granted on an affidavit being filed, shewing that the defendants were in the act of removing the property, notwithstanding the notice of motion had been served.⁵

Where a warehouseman had delivered warehouse or transfer receipts to a party for one thousand barrels of flour, and afterwards delivered out a portion thereof, at the instance of the party who had left it in his custody, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse, and it appeared that such a course of dealing was in accordance with the usage of the trade; the Court refused an

1 *Ley v. McDonald*, 2 Grant, 398.

2 *McMaster v. Callaway*, 6 Grant, 577.

3 *Ely v. Wilson*, 7 Grant, 103.

4 *Fisken v. Rutherford*, 7 U. C. L. J. 124.

5 *Wilnot v. Matland*, 2 Grant, 556.

injunction to restrain the delivery of flour subsequently brought by the same party to the warehouse, although such latter flour had been assigned *bona fide* to the plaintiff who had made advances thereon after it was stored, and although such flour had not been manufactured at the time of giving the warehouse receipts.¹ The Court will restrain a vendor of goods from selling property previously contracted to be sold, if the vendee has not been negligent in carrying out his part of the agreement.² The plaintiff filed a bill for the protection of the timber on certain land which he claimed to own ; at the hearing the Court retained the bill, with liberty to the plaintiff to bring an action ; the plaintiff brought the action, and recovered a verdict for \$20 ; it appearing that the question in issue was the plaintiff's title to the land, he was *held* entitled to a decree with costs, notwithstanding the small amount of damage which had been actually done by the defendant.³ Where a plaintiff filed a bill for an injunction and payment of damages ; and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced ; *held*, that the Court had not jurisdiction to make a decree for the damages. The defendant having neglected to inform the plaintiff of the discontinuance, though applied to respecting it, before suit, the bill was dismissed without costs.⁴

If the application for the injunction is *ex parte*, the party applying must deliver copies of the affidavits upon which it was granted immediately upon the receipt of the usual request and undertaking.⁵

The witnesses may also be examined orally, and be cross-examined on their affidavits, in the manner before described ;⁶ but unless the defendant gives notice that he intends to read his answer on the application, he cannot be cross-examined upon it.⁷

1 *Ibid.*, 3 Grant, 107.

2 *McLean v. Coons*, 3 Grant, 112.

3 *McAlpine v. Eckfrid*, 16 Grant, 595.

4 *Brockington v. Palmer*, 18 Grant, 488, and see *Radway v. Coleman*, 15 Grant, 50.

5 Ord. 648 ; *ante*.

6 *Ante* ; *Benemeres v. Benemeres*, Kay, App. 17 ; *Normantville v. Stanning*, 10 Hare, App. 20 ; *Nichols v. Ibbetson*, 7 W. R. 430 ; V. C. W.

7 *Wightman v. Wheelton*, 23 Beav. 397 ; 3 Jur. N. S. 124 ; and see *Whitton v. Jennings*, 1 Dr. & Sm. 110 ; S. C. nom. *Whitten v. Jennings*, 6 Jur. N. S. 164.

Under special circumstances, affidavits filed after the motion is opened may be admitted.¹

An affidavit, which was properly intituted in the cause at the time it was filed, may be used, on a motion for an injunction, although the title of the cause has since been changed by amendment.²

An injunction will not be ordered, if the bill contain any scandalous matter;³ and if a demurrer,⁴ or plea,⁵ has been filed, it must, except under special circumstances, be disposed of, before the injunction can be issued; and, for that purpose, it may, on the application of the plaintiff, be ordered to be set down and argued *instanter*;⁶ but the usual course now, is for it to be brought on and argued with the motion for the injunction.⁷

If the bill is amended, in the interval between the service of the notice of motion and the day for which it is given, a new notice is necessary; and the plaintiff will be ordered to pay the costs occasioned by the former notice.⁸ Where the plaintiff desires to amend his bill during such interval, he should apply specially, by summons, for leave to amend, without prejudice to the notice of motion for the injunction.⁹

A motion for an injunction is now often converted into a motion for a decree; but wherever this is done, the motion should be set down in the cause book.¹⁰ If necessary, the motion will be directed to stand over to a fixed day; and terms will be imposed as to the time for filing affidavits.¹¹

1 *East Lancashire Railway Company v. Hatterley*, 8 Hare, 72, 86; *Smith v. Swansea Company*, 9 Hare, App. 20; *Munro v. Wickenhoe and Brightlingsea Railway Company*, 18 W. R. 880, L.J.J.; *ante*.

2 *Hawes v. Bamford*, 9 Sim. 652.

3 *Davenport v. Davenport*, 6 Madd. 251. As to scandal, see *ante*.

4 *Ante*; *Cousins v. Smith*, 13 Ves. 164; *Jones v. Taylor*, 2 Madd. 181; *Const v. Harris*, T. & R. 510, n. If justice requires it, an injunction may, however, be issued: *Wardle v. Claxton*, 9 Sim. 412.

5 *Ante*; *Anon.*, 2 Atk. 113; *Humphreys v. Humphreys*, 3 P. Wms. 396, 396; and see *Evans v. Coventry*, 5 De G. M. & G. 911.

6 *Anon. v. Bridgewater Canal Company*, 9 Sim. 378; and see *Jones v. Taylor*, 2 Madd. 181.

7 *Seton*, 872.

8 *Martin v. Fust*, 8 Sim. 199; *Gouthwaite v. Rippon*, 1 Beav. 54; 3 Jur. 7; *Monypenney v. —*, 1 W. R. 99, V. C. T.; *London & Blackwall Railway Company v. Limehouse Board of Works*, 3 K. & J. 123; *ante*.

9 *Martin v. Fust*, *ubi sup.*

10 *Green v. Low* (No. 1), 22 Beav. 395. As to motions for decree, see *ante*; and see *Nicklethwait v. Nicklethwait*, 1 De G. & J. 504, 509; 3 Jur. N. S. 1279, 1280.

11 *Seton*, 871. For form of order, see *ib.* 868.

The orders pronounced by the Court, in cases of interlocutory injunctions, have varied at different periods.¹ The form most frequently adopted enjoined the party "till further order."² In some cases, the injunction has been till "appearance and further order;"³ in others, till "answer and further order."⁴ The form now usually adopted is "until the hearing of the cause, or until further order."⁵ In the case of a bill of discovery, however, the form is "until answer or further order."⁶

Where the question in the suit is distinctly raised on the motion for the injunction, and is ripe for decision, the order on the motion ought to declare the rights of the parties: in order that the defendant may know what the Court considers to be the limit of his rights.⁷

If the bill is for discovery in aid of the defence to an action at Law, the plaintiff is, on making out a *prima facie* case, entitled to a full discovery; and an injunction to restrain the proceedings at Law will be granted, although his equity is displaced by the defendant's evidence;⁸ but he must, in addition to verifying the truth of the statements in the bill which are within his own knowledge, also swear to his belief in the truth of those which rest on information derived from other persons.⁹

The injunction is often ordered, on the terms of the plaintiff paying into Court the amount in dispute.¹⁰ On account, however, of the greater rapidity with which a cause can now be brought to a hearing, this course is not so frequently directed as it formerly was.¹¹ Security for payment of any damages which may be

1 It is said to have been usual to grant injunctions on surmises, with a proviso *si ita sit*: *Podringham v. Chomeley*, Carey 37.

2 *Lane v. Newdigate*, 10 Ves. 192.

3 *Lord Grey De Wilton v. Sozon*, 6 Ves. 106.

4 *Potter v. Chapman*, 1 Dick. 146; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; 2 Dick. 708; *Drury v. Molina*, 6 Ves. 328; *Lord Tansworth v. Lord Ferrers*, *ib.* 419. It is stated in the report of *Robinson v. Lord Byron*, *ubi sup.* in 2 Cox, 4, 5, that the injunction was till "answer or further order;" but this is a mistake: see S. C. Reg. Lib. 1784, B. 143.

5 *Seton*, 870; *ib.* 867, No. 1.

6 *Senior v. Pritchard*, 16 Beav. 473; *Lovell v. Galloway*, 17 Beav. 1; *Ooddeen v. Oakley*, 2 De G. F. & J. 158; *ante*.

7 *Colther v. Midland Railway Company*, 2 Phill. 469, 472.

8 *Senior v. Pritchard*, *ubi sup.*; and see *Lovell v. Galloway*, *ubi sup.*; *Fitzgerald v. Bull*, 9 Hare, App. 65; *Harris v. Collet*, 26, Beav. 222; *ante*.

9 *Mollett v. Bnequist*, 35 Beav. 609; 4 Jur. N. 8. 1009.

10 *Sherwood v. White*, 1 Bro. C. C. 452; *Acton v. Market*, 2 Bro. C. C. 14; *Culley v. Hickling*, *ib.* 182; *Wenket v. Carnevali*, *ib.* 182, n.; *Coglan v. Regueneau*, *ib.* 183, n.; *Potts v. Butler*, *ib.* 184, n.; S. C. *nom.* *Potts v. Butler*, 1 Cox, 330; *Armitstead v. Durham*, 11 Beav. 556, 561; *Anderson v. Noble*, 1 Drew. 148; *Stockport District Waterworks Company v. Jowett*, 13 W. R. 917, L. C. For form of order, see *Seton*, 875 No. 4.

11 *Maitland v. Backhouse*, 16 Sim. 58, 69; 12 Jur. 46, L. C.

awarded, in pursuance of the plaintiff's undertaking, is sometimes required.¹

If the object of the suit is to restrain proceedings in another Court, the injunction will be awarded against the defendant, his attorneys, and agents. If it is to restrain the commission of waste, or any other inequitable act, it is awarded against the defendant, his servants, workmen, and agents; and these words will be inserted in the order, although the bill and notice of motion only ask for an injunction against the defendant.²

Where the plaintiff sues on behalf of himself and others, it seems that an injunction to stay proceedings against the plaintiff only will be granted; and not against the other persons on behalf of whom he sues.³

An order for an injunction having been obtained, it should be drawn up, passed, and entered without delay.⁴ It frequently happens, however, (especially if the order is made in vacation, when the offices are closed,) that the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait till the order could be passed, and the writ issued upon it. In such cases, the practice is to serve the party personally with notice in writing, that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices;⁵ or else to procure a transcript of the minutes of the order signed by the Registrar, and to serve the same personally, by delivering a copy of it: showing, at the same time, the original transcript so signed; and either the notice or the copy of the minutes will be sufficient to render the defendant, or other person enjoined, guilty of a contempt, if he acts in opposition to the injunction. In such case, however, there must be no delay in getting the order drawn up, and the injunction issued; and serving it when obtained.⁶

¹ See *Seton*, 868, No. 4.

² *Seton*, 869; and see *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180; 12 Jur. 367. For form of order, see *Seton*, 867, No. 1.

³ *Armistead v. Durham*, 11 Beav. 556, 561, n.

⁴ See *Bateman v. Watt*, 11 Beav. 587.

⁵ In country cases, the terms of the injunction, as soon as it is granted, are frequently communicated by telegraph to an agent; and he prepares therefrom and serves the formal notice mentioned in the text.

⁶ *Kimpton v. Eve*, 2 V. & B. 349; *Vanandam v. Rose*, 2 J. & W. 264; *McNeil v. Garratt*, C. & P. 98; 5 Jur. 836; and see *post*.

The writ of injunction is prepared by the solicitor of the party. It must be signed by the Clerk of Records and Writs, and sealed with the seal of that office. The writ must be indorsed with the name and place of business of the plaintiff's solicitor, and of his agent if any; or with the name and place of residence of the plaintiff, where he acts in person; and, in either case, with the address for service, if any.¹

Unless substituted service has been authorised,² the service of the injunction or restraining order must be personal; and is effected, by leaving with the person served³ a true copy of the writ or order; and, at the same time, showing him the original writ as duly issued, or the restraining order as duly passed and entered.⁴

If the person restrained from prosecuting any action or proceedings in any Court of Law or Equity disobeys the injunction or restraining order, the remedy is by process of contempt against him.

An interlocutory injunction may be dissolved at any time before the hearing of the cause; and is *ipso facto* dissolved by the dismissal of the bill;⁵ or the allowance of a demurrer to the whole bill: although leave to amend may have been given.⁶ An injunction "until answer or further order" is not dissolved by the mere putting in of a sufficient answer: an order for that purpose must be obtained.⁷

An injunction is not in general dissolved by a subsequent amendment of the bill;⁸ but where the record was altered by the addition of a plaintiff, it was held to have this effect.⁹

¹ Ord. 40-41, *ante*.

² See *ante*, *Anderson v. Lewis*, 3 Bro. C. C. 429; *Lord Portarlington v. Graham*, 5 Sim. 418; *Kirkman v. Honnor*, 6 Beav. 400; *Heald v. Hay*, 9 W. R. 369, V. C. S.

³ As to service, in the case of a corporation aggregate, see *Carron Company v. MacLaren*, 5 H. L. Ca. 416.

⁴ *Brathwaite's Pr.* 228, 229; *Woodward v. King*, 2 Dick. 797; S. C. *nom. Woodward v. Earl Lincoln*, 3 Swanst. 626; *Ellerton v. Thirsk*, 1 J. & W. 376; *Gooch v. Marshall*, 8 W. R. 410, V. C. W.

⁵ *Bliss v. Collins*, cited 2 Mer. 62; *Green v. Puleford*, 2 Beav. 70, 76.

⁶ *Schneider v. Lizardi*, 9 Beav. 468; but see *Attorney-General v. Marsh*, 16 Sim. 572; 13 Jur. 317.

⁷ *Ooddeen v. Oakley*, 2 De G. F. & J. 168; and see *Mollett v. Enequist* (No. 2.) 36 Beav. 408.

⁸ *Davis v. Davis*, 2 Sim. 515; *Warburton v. London & Blackwall Railway Company*, 2 Beav. 258; *Brooks v. Purton*, 1 Y. & C. C. C. 271; 6 Jur. 94; *Kennedy v. Lewis*, 14 Jur. 166, V. C. K. B. It is not necessary, though usual, for the order giving leave to amend to state that the amendment is made without prejudice to the injunction: *ante*, *Seton*, 873.

⁹ *Attorney-General v. Marsh*, 16 Sim. 572; 13 Jur. 317; and see *Davis v. Davis*, *Warburton v. London & Blackwall Railway Company*, and *Kennedy v. Lewis*, *ubi sup.*

An application to dissolve an interlocutory injunction is made by motion :¹ of which notice should be given, in the usual manner.² The notice should be given for one of the days appropriated to the hearing of motions ; but if it be important that the motion should be made without waiting for such a day, application should be made to the Court, before the notice of motion is served, for permission to give the notice of motion for a particular day ; and the fact of such permission being given should be mentioned in the notice of motion.³ The plaintiff is sometimes, by the interim order required to undertake that he will accept short notice to discharge the order.⁴

It seems that where an injunction is granted against several defendants, one of them may move to dissolve, in the absence of the rest.⁵ In an interpleader suit, however, the notice of the motion to dissolve the injunction must be served on all the defendants.⁶

If the injunction was obtained on a misstatement of the facts, the motion should be to discharge the order, and not to dissolve the injunction.⁷

The application to dissolve an injunction must be supported by evidence (which is usually given by affidavit,) on the part of the defendant, in answer to that upon which the injunction was obtained ; and the case, thus made by the defendant, may be met by counter evidence on the part of the plaintiff.⁸ The answer of the defendant is, for the purpose of evidence on the motion to be regarded merely as an affidavit, and affidavits may be received and read in opposition thereto ;⁹ and at the hearing of the motion, the defendant may avail himself of any technical objection to the bill which would have been held good on demurrer.¹⁰

1 Where a person not a party to the cause is injuriously affected by the injunction, he may, it seems, apply by petition to set it aside : *Bourbaud v. Bourbaud*, 12 W. R. 1024, V. C. W. As to petitions, see *ante*.

2 In pressing cases, the Judge will appoint a special hearing at his house for the purpose.

3 *Ante*.

4 See *Seton*, 887, No. 1.

5 *Joseph v. Doubleday*, 1 V. & B. 497 ; *Lewis v. Smith*, 7 Beav. 470 ; *Money v. Jordan*, 13 Beav. 229 ; *Macgregor v. Cunningham*, 16 Sim. 366 ; 12 Jur. 966, see, however, *Thompson v. Geary*, 5 Beav. 131.

6 *Masterman v. Lewis*, 2 Phil. 132, 139 ; *ante*.

7 *Angier v. May*, 3 W. R. 330 ; 3 Eq. Rep. 488, V. C. W.

8 As to evidence on motions, see *ante*.

9 Order 285.

10 *Barneley Canal Company v. Twibell*, 7 Beav. 31 ; *Hudson v. Maddison*, 12 Sim. 416 ; 5 Jur. 1194.

Where an interim order has been made, and simultaneous applications are made, both for an injunction and to discharge the order, the plaintiff is entitled to begin.¹

If, upon hearing the motion, the Court is of opinion that the injunction was obtained by a suppression of material facts, or that it was improperly granted, or that the case made by the plaintiff is contradicted or not supported, it will order the injunction to be dissolved, either with or without costs, as the justice of the case may require.² If an undertaking as to damages has been given, the Court may give directions for the ascertainment of the amount, and order payment thereof to the defendant.³ But if the defendant does not succeed in satisfying the Court that the injunction ought to have been refused, or that it ought not to be continued, or the Court considers that the defendant is estopped by his own *laches* or acquiescence, the application will be refused and the injunction continued.⁴

Where, in the case of a bill of discovery, an injunction until answer or further order has been obtained against several persons, who have jointly commenced an action at Law, it will not be dissolved until they have all answered.⁵

When the injunction has been granted until answer or further order, a motion to dissolve it will not be entertained until the plaintiff has had reasonable time to consider whether the answer is sufficient.⁶

The Court has refused to entertain a motion to dissolve an injunction, pending an application for the production of documents.⁷

¹ *Fraser v. Whaley*, 2 H. & M. 10.

² *Ante*, *Spottiswoode v. Clarke*, 2 Phill. 154; 1 C. P. Coop. t. Cott 254; 10 Jur. 1043; *Cory v. Yarmouth & Norwich Railway Company*, 3 Hare, 593; *Dalglish v. Jarvis*, 2 M.N. & G. 231; 14 Jur. 945; *Great Western Railway Company v. Oxford, Worcester & Wolverhampton Railway Company*, 5 De G. & S. 437; *Rochdale Canal Company v. King*, 2 Sim. N. S. 72; 15 Jur. 962. For form of order, see *Seton*, 941, No. 1; 942, No. 3.

³ See *ante*, *Seton* 868, No. 5; and see *Newby v. Harrison* 7 Jur. N. S. 981; 9 W. R. 849, L.J.J.

⁴ *Packington v. Packington*, 1 Dick. 101; *Attorney-General v. Burrows*, ib. 128; *Anon.*, 3 Atk. 485; *Feist v. King's College, Cambridge*, 10 Beav. 491; 11 Jur. 506; *Glascott v. Lang*, 3 M. & C. 451; 2 Jur. 909. For form of order, see *Seton*, 941.

⁵ *White v. Steinwacks*, 19 Ves. 85; *Joseph v. Doubleday*, 1 V. & B. 497; *Naylor v. Middleton*, 2 Mad. 131; *Nanney v. Vaughan*, 8 Sim. 439; and see *Glascott v. Copper Miners' Company*, 11 Sim. 314; 5 Jur. 264.

⁶ *Gibson v. Chayters*, 8 Beav. 167; but see *Stanley v. Bond*, 5 Beav. 175; *Cresy v. Beavan*, ib. 177, n. 7 *Storer v. Jackson*, 12 Sim. 508.

If the motion to dissolve is useless, the defendant will be directed to pay the costs of it, whatever may be the result of the suit.¹

Although the bill seeks merely an injunction, or an injunction with an account consequent upon the injunction, and the result of an inquiry, or the trial of a question of fact, is unfavourable to the plaintiff's right to the injunction, the defendant cannot on that ground move to dismiss the bill. Where a motion of this nature was attempted, after a case at Law had been certified against the plaintiff, Lord Eldon refused it: saying that, upon the certificate from the Court of Law, the case stood as if he had declared his own opinion to the effect that the plaintiff could not succeed in his motion for an injunction; and that the cause might still be brought to a hearing: when the Court might entertain a different opinion upon the title.²

Although an injunction may be granted *ex parte*, and sustained upon a motion to dissolve it, yet if, at the hearing of the cause, there be no evidence against the defendant, the bill will be dismissed.³

An injunction had been obtained against a defendant, and after the limited time for putting in an answer had expired, an order *pro confesso* was taken out against him—he then gave notice of motion to dissolve the injunction. *Held*, that the statements of the bill having been confessed by his allowing the order *pro confesso* to stand, precluded him from moving.⁴

Where an *ex parte* injunction was served 24th December, and the bill was not served up th 13th May following, the injunction was dissolved for the neglect to serve.⁵

In general, a party who is entitled to an injunction is also entitled to the costs of it; but if he has asked too much by his notice of motion, he may be deprived of the costs to which he would otherwise have been entitled.⁶

1 *Norton v. Nichols*, 4 K. & J. 475.

2 *Brooke v. Clarke*, 1 Swanst. 560.

4 *Manly v. Williams*, 5 U. C. L. J., 168.

6 *Moet v. Couston*, 33 Beav. 578: 10 Jur. N. S. 1012.

3 *Barfield v. Kelly*, 4 Russ. 355-358.

5 *Heron v. Scrisher*, 13 Grant, 438.

An interlocutory injunction or restraining order continues in force, notwithstanding the suit has abated; and, in such case, if the party enjoined wishes to get rid of the injunction, he must move upon notice that the plaintiff, or the persons representing his interest, may revive within a given time, or else that the injunction may be dissolved.¹

Continuing or granting Injunctions at the Hearing.

An injunction, which has been granted upon an interlocutory application, is superseded by the decree made at the hearing of the cause. If, therefore, it is intended that it should still remain in force, it must be expressly continued.² Injunctions are continued at the hearing either provisionally or permanently. They may be continued provisionally, pending inquiries or accounts which are preparatory to a final adjudication upon further consideration. Injunctions may be permanently continued, or made perpetual, by the decree, where the party enjoined is in possession of some instrument conferring a legal right, which it is contrary to Equity that he should be permitted to exercise to the detriment of the plaintiff. Therefore, where the plaintiff gave to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant, contrary to his promise, put the notes in suit against the plaintiff, who thereupon filed a bill praying that the notes might be delivered up to be cancelled, and that the defendant might be restrained, by injunction, from proceeding upon them, the Court, at the hearing, directed that a perpetual injunction should issue, and that it should extend to restrain the indorsing and further negotiation of the notes.⁴

The general course of the Court, where a party is in possession of a security or other instrument which it is against conscience that he should use against the defendant, is, however, to direct it to be delivered up and cancelled: a course which it will adopt even

1 *Randall v. Mumford*, 18 Ves. 427; *Stuart v. Ancell*, 1 Cox, 411; *Hill v. Hoare*, 2 Cox, 56; *Wholes v. Malins*, 4 Madd. 171; *Adamson v. Hall*, T. & R. 258; and see *Jones v. Massey*, and *Turner v. Cole*, cited 3 Beav. 292. As to the effect of abatement upon a perpetual injunction, see *post*.

2 *Seton*, 944; and for form of direction, see *ib.* 941, No. 2; 943, 944.

3 *Old v. Old*, Seton, 105, No. 3.

4 *Chenel v. Churchman*, 3 Bro. C. C. 16, n.; *Minshaw v. Jordan*, *ib.* 17, n.; and see *ib.* ed. Belt, n. (2); *Harrington v. Du Chatel*, 1 Bro. C. C. 124; 2 Swanst. 158, n.; 3 C. nom. *Harrington v. Chastel*, 2 Dick. 158.

where the instrument is void in Law ; although it has been sometimes doubted whether this remedy is applicable to cases of this description : as the circumstances which render the instrument void at Law might be shown or pleaded there, to any action which might be brought upon such an instrument.¹

The practice of extending injunctions at the hearing, so as to render them perpetual, is not confined to cases in which the party is in a position to annoy the plaintiff by proceedings which he may have a legal right to institute ; but it is applied to prevent a continuation or repetition of acts for which the party has no legal authority whatever. Thus, injunctions to restrain waste, or the infringement of a patent, may be made perpetual at the hearing. So, also, may injunctions to restrain the piracy of a publication ;² or to restrain the use by one tradesman of the trade-marks of another ;³ but to support a decree for a perpetual injunction, the Court requires that there shall be nothing like a doubt in the case. Thus, where the defendant had, in two numbers of a periodical publication of theatrical criticism, inserted detached extracts, to the amount of six or seven pages, from a farce, the property of the plaintiff, containing forty pages, which were interspersed with criticisms, Sir William Grant, M. R., considered the question, whether the defendant had transgressed the allowed limits of fair extracts, too doubtful to warrant the Court in making a decree for a perpetual injunction, and dismissed the bill with costs.⁴

In order to entitle a plaintiff to an injunction at the hearing, it is not absolutely necessary that he should previously have made an interlocutory application for one ;⁵ and he is at liberty then to claim an injunction, although he may have previously failed to obtain one, or to support it when obtained.⁶ But where he has not

1 See 2 *Swanst.* 157, n., where the cases on this subject are collected ; *Simpson v. Lord Howden*, 3 M. & C. 97.

2 *Maclean v. Richardson*, Amb. 684, 696 ; and for the order in that case, see *Seton*, 944, No. 2 ; *Manby v. Owen*, 4 Burr. 2529, cited 15 Ves. 502 ; see also *Colburn v. Simms*, 2 Hare, 548 ; *Kelly v. Hooper*, 1 Y. & C. C. 197 ; *Seton*, 908 ; *ante*.

3 *Millington v. Fox*, 3 M. & C. 338, 351.

4 *Whittingham v. Wooller*, 2 *Swanst.* 428 ; see also *Baily v. Taylor*, 1 R. & M. 78 ; and as to the form of the injunction, where the defendant submits, see *Attorney-General v. Boyle*, 10 Jur. N. S. 309, V. C. W.

5 *Bacon v. Spottiswoode*, 1 Beav. 382, 384 ; 3 Jur. 476 ; S. C. on appeal, *non*, *Bacon v. Jones*, 4 M. & C. 433 ; 3 Jur. 994 ; *Rodgers v. Nowell*, 6 Hare, 325, 329 ; *Cudston v. Morley*, 7 Hare, 202, 206 ; *Dickenson v. Grand Junction Canal Company*, 15 Beav. 260 ; *Davies v. Marshall*, 1 Dr. & Sm. 567, 560 ; 7 Jur. N. S. 720, 722. As to the effect of laches or acquiescence, see *Attorney-General v. Luton Board of Health*, 2 Jur. N. S. 180, 182, V. C. W. ; *Patching v. Drubbins*, Kay, 1, 9 ; *Johnson v. Wyatt*, 2 De G. J. & S. 18 ; 9 Jur. N. S. 1383.

6 *Baily v. Taylor*, *ubi sup.*

previously obtained an injunction, he has the obligation of making out a clear and unexceptionable title at the hearing imposed upon him, and, if he fails in that, he will not be allowed to use the facts proved in the cause as evidence of a *prima facie* case, giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title.

The principles above laid down do not, of course, apply to those injunctions which are only granted at the hearing of the cause: such as mandatory injunctions;¹ injunctions to restrain the setting up of outstanding terms; and others of that description.

With respect to the cases in which the Court will decree perpetual injunctions at the hearing of the cause, it may be mentioned, that if a decree has been made for the performance of trusts, the defendant will be perpetually enjoined from setting up a legal estate in order to overturn it.² So, if a will is established against an heir, who suffers the bill to be taken *pro confesso* against him: as that, in effect, is confessing he has no claim, if he permits the decree or order, by which he is excluded, to be made absolute: which is, in effect, admitting that if he had any claim he has abandoned it: the Court will enforce the decree or order, until it is duly reversed: and it will grant, for that purpose, a perpetual injunction.³

Perpetual injunctions will also be decreed, where the same question has been frequently litigated in the same manner; or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace, where it is necessary to quiet the rights, after repeated ejectments: for such a proceeding, unless prevented, would become oppressive to the opposite party;⁴ or, where there is one general right to be established against a great number of persons: as, the right of a parson against his parishioners for tithes; or the right of parishioners against a parson for a modus; or the rights of a lord of the manor against his tenants

¹ *Gale v. Abbot*, 8 Jur. N. S. 987, V. C. K.

² *Askew v. Poulterers' Company*, 2 Ves. S. 90; *Buckingham v. Buckingham*, 2 Eq. Ca. Ab. pl. 11, 536.

³ *Selby v. Selby*, 2 Dick. 678.

⁴ *Leighton v. Leighton*, 1 P. Wms. 671; 1 Str. 404; 4 Bro. P. C. ed. Toml. 378; *Devenisher v. Newenham*, 2 Sch. & Lef. 199, 211; *Earl of Bath v. Sherwin*, 10 Mod. 1; 4 Bro. P. C. ed. Toml. 373; *Hodgson v. Duce*, 2 Jur. N. S. 1014, V. C. S.; *Lowndes v. Bettle*, 10 Jur. N. S. 226; 12 W. R. 390, V. C. K.

for encroachments ; or the right of the tenants against the lord for disturbance : for, as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the Court will put the whole in peace by a perpetual injunction.¹ An injunction will also be granted at the hearing, whenever it is necessary for the purpose of complete justice :² although it is not prayed by the bill,³

As a general rule, an injunction can only be made perpetual at the hearing of the cause ;⁴ and the plaintiff has a right to proceed with his cause for that purpose, although he has obtained an interlocutory injunction which has been acquiesced in by the defendant.⁵ By consent, however, the injunction may be made perpetual, on an interlocutory application.⁶

It is not usual to issue a second writ when the injunction is made perpetual ; it may, however, be issued and served.⁷

An injunction which has been made perpetual is so far final as to remain in force notwithstanding the abatement of the suit ; for if it was necessary to revive upon every abatement, that would be in effect a perpetual suit.⁸

Consequences of the Breach of an Injunction or Restraining Order.

The remedy, in the event of the breach of an injunction or restraining order, is by committal ; and not by attachment.⁹ What will be considered as a breach, depends entirely upon the form of the injunction or order, and the nature of the act to be prohibited.¹⁰ Any person who acts in contravention of it will be held to have been guilty of a contempt, and may be ordered to be

1 *Lord Tenham v. Herbert*, 2 Atk. 483 ; *Mayor of York v. Pilkington*, 1 Atk. 282 ; *Conyers v. Lord Abergavenny*, *ib.* 285 ; but see *Lord Sefton v. Lord Salisbury*, 7 W. R. 272, V. C. W.

2 *Dickenson v. Grand Junction Canal Company*, 15 Beav. 280.

3 *Blomfield v. Eyre*, 8 Beav. 250, 259 : 9 Jur. 717 ; *Reynell v. Sprye*, 1 De G. M. & G. 660 ; but see *Russell v. London, Chatham & Dover Railway Company*, 4 Giff. 403 ; S. C. *nom. Norman Scott-Russell v. London, Chatham & Dover Railway*, 9 Jur. N. S. 1007.

4 *Day v. Snee*, 3 V. & B. 170 ; *Seton*, 944.

5 *Duke of Beaufort v. Morris*, 6 Hare, 350 ; see S. C. 2 Phil. 683 : 12 Jur. 614.

6 *Seton*, 944 ; *Morrell v. Pearson*, 12 Beav. 284.

7 *Brathwaite's Pr.* 229.

8 *Askew v. Townsend*, 2 Dick. 471 ; S. C. *nom. Ascough v. Townsend*, cited 3 Ves. 197. As to the effect of abatement upon an interlocutory injunction, see *ante*.

9 *Brathwaite's Pr.* 228 ; *Seton*, 945, 947 ; *Angerstein v. Hunt*, 6 Ves. 488 ; *Gooch v. Marshall*, 8 W. R. 410, V. C. W.

10 See *St. John's College v. Carter*, 4 M. & C. 497 ; S. C. *nom. St. John's College v. Pratt*, 3 Jur. 187 ; *Money v. Jordan*, 13 Beav. 229.

committed.¹ An injunction was issued restraining the defendant from removing logs from a certain specified lot of land; before this, he had removed the logs from the lot to the adjoining road allowance, and after being served with the injunction he took these away to his mill. The Court refused to commit him for a breach of the injunction.²

An injunction operates from the date of the order, and not from the sealing of the writ;³ and although it has been irregularly obtained, it is still an order of the Court, and must be discharged before it can be disobeyed.⁴ Where, however, the defendant and his solicitors had been guilty of a breach of an injunction which was irregular, Lord Eldon refused to commit them; but ordered them to pay the costs occasioned by the breach, and of the motion to commit.⁵

Before the Court will punish for a breach of an injunction or restraining order, it must be clear that the party knew that the injunction had been issued, or that the order had been made. Strictly speaking, he ought to be served with the writ or order itself, in the manner already pointed out; but circumstances may justify a committal, without the actual service of the writ or order: as where the matter is pressing, and there is not time to procure it: in which case, as we have already seen,⁶ the immediate service of the writ will be dispensed with, and service of a copy of the minutes of the order, or of a notice of its having been made, will be sufficient.

A defendant is bound to obey any injunction of which he is made aware, before being served with it; but the plaintiff must not be guilty of delay in effecting formal service, as the rule for dispensing with such service applies only until the plaintiff has time to make the service.⁷

1 *Harvey v. Mountague*, 1 Vern. 57, 122; *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, 181; 12 Jur. 367.

2 *Ball v. Sherlock*, 16 Grant, 668.

3 *Osborne v. Tennant*, 14 Ves. 136; *James v. Downes*, 18 Ves. 522; *Rattray v. Bishop*, 3 Madd. 229.

4 *Robinson v. Lord Byron*, 2 Dick. 703; *Woodward v. King*, *ib.* 797; S. C. *nom.* *Woodward v. Earl of Lincoln*, 3 Swanst. 626.

5 *Partington v. Booth*, 3 Mer. 148; *Drevery v. Thacker*, 3 Swanst. 546.

6 *Ellerton v. Thirsk*, 1 J. & W. 376; *Gooch v. Marshall*, 8 W. R. 410, V. C. W.

7 *Stewart v. Richardson*, 17 Grant, 150.

In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given. Thus, it was held, by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice;¹ and if the party remains in Court, until the order is about to be made, he cannot, by leaving at that instant, avoid its consequences.² So also, if he is informed that the injunction has been granted, and there will be no delay on the part of the plaintiff in endeavouring to get the order drawn up, the defendant will be committed for the breach of it: because it would be a contempt to act contrary to such an order, when he knew the order was made. In these and the like cases, all the mischief might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees; or, if it was against marrying a ward of Court, the marriage might be had next morning, by a license fraudulently obtained.³ In short, the Court will not, under such circumstances, permit a man to elude its justice, by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt; but the plaintiff must not be guilty of any unnecessary delay, either in getting the order drawn up, of in serving it, or the writ, when obtained.⁴

The order for committal is obtained upon motion, of which notice must have been duly served personally upon the person committing the contempt.⁵ The terms of the notice of motion should be that the party "may stand committed" to prison, for breach of the injunction.⁶ If the breach has been committed by a person who was not named in the writ or order, the notice or motion must be, that he may be committed for his contempt, in knowingly assisting in the breach.⁷ The plaintiff may also, it

1 *Anon.* 3 Atk. 567; *Skip v. Harwood*, *ib.* 564.

2 *Osborne v. Tennant*, 14 Ves. 136.

3 Per Lord Eldon, in *Kimpton v. Eve*, 2 V. & B. 361; *Vausandau v. Rose*, 2 J. & W. 264.

4 *James v. Downes*, 18 Ves. 522; *Bateman v. Wiatt*, 11 Beav. 587.

5 *Angerstein v. Hunt*, 6 Ves. 488.

6 Where the injunction is that he may do a particular thing, the order is, that he may do it by a particular day, or stand committed: *Durant v. Moore*, 2 R. & M. 33. It seems the motion to commit can only be made on a motion day; *Saaby v. Saaby*, 7 Sim. 140; and see *ante*.

7 *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, 181: 12 Jur. 367.

seems, obtain an order, *ex parte*, that the party may stand committed on a certain day, unless he shows cause against it; which order must be personally served upon the party to be committed.¹ But, whether it be an order *nisi*, or a notice of motion for an absolute committal, the service must be personal: unless an order for substituted service is obtained. Thus, where the defendant has absconded, an order may be obtained, on *ex parte* motion, that service on his solicitor, or at his last place of abode, shall be deemed good service; and, upon that service, under such circumstances, he may be committed.²

It will be recollected that Order 6, abolishes Orders *nisi*; and Order 295 provides that "In lieu of an Order *nisi*, notice is to be given of the motion for an Order absolute."

An affidavit of the personal service of the notice of motion should of course be prepared and filed; and on the day named in the notice, the motion should be made, by counsel for the plaintiff, for the commitment.

The motion must be supported by affidavits, proving the due service of the notice of motion; that the party had notice of the injunction or restraining order; and that he has committed a breach of it.³

Lord Eldon is reported to have said,⁴ that a motion to commit, for breach of an injunction, could not be made without producing the writ; but, in a case before Lord Cottenham, he held, that if a party, having notice of an injunction, is guilty of a breach of it, he may be committed, without the production of the writ.⁵

If, on the hearing of the motion, the facts are disputed, a trial of the question of the fact will, if necessary, be directed.⁶

¹ *Durant v. Moore*, 2 R. & M. 83; *Blanchard v. Casothorne*, 6 Sim. 155.

² *Pulteney v. Shelton*, 5 Ves. 147; *Pearce v. Crutchfield*, 14 Ves. 206; and see *Re Beger*, 3 Jur. N. S. 980, V. C. W.

³ As to the necessary evidence, see *St. John's College v. Carter*, 4 M. & C. 497; S. C. nom. *St. John's College v. Pratt*, 3 Jur. 187. For form of order, see *Seton*, 946.

⁴ *Ellerton v. Thirsk*, 1 J. & W. 376.

⁵ *McNeil v. Garratt*, C. & P. 98; 5 Jur. 886.

⁶ *Agar v. Regent's Canal Company*, G. Coop. 77.

The order for committal¹ is drawn up, in the usual manner,² and delivered by the party who has obtained it to the sheriff: who will thereupon proceed to execute it.

If the breach of the injunction or order was the result, rather of an error in judgment than of a wilful contempt, the Court will not direct a commitment; but will merely order the party to pay the costs incurred by the breach of the injunction or order, and of the application.³

The plaintiff may, also, by his acquiescence in the breach, waive with the ordinary process: though, strictly speaking, no act of the parties can amount to a waiver of a contempt of the Court.⁴

Peers, and others entitled to privilege of peerage, and Members of the House of Commons, are not liable to be committed for a breach of an injunction or order, but the Court will order a sequestration to issue.⁵ The same course of proceeding may be adopted, in the case of a corporation aggregate.⁶

Although the injunction or order is irregular, a party acting in contravention of it will be guilty of contempt.⁷ The proper course, where there is an irregularity, is to move at once, upon notice, that it may be discharged for irregularity.⁸

An order for committal will be irregular, if it does not state the affidavit of service of the restraining order, or injunction, and of the notice of motion to commit, or that the defendant has appeared by counsel on the hearing of the motion (if that was the case).

In 1845 the plaintiff obtained an injunction restraining the defendant from suffering to continue any dam, whereby the natural flow of the river, on which they both had mills, should be inter-

1 For form of order, see *Seton*, 945, No. 1.

2 *Ante*.

3 *Bullen v. Orey*, 16 Ves. 141-144; *Leonard v. Attwell*, 17 Ves. 885, 886; *Drewry v. Thacker*, 3 Swanst. 548; *Partington v. Booth*, 3 Mer. 148; *Rantzen v. Rothschild*, 14 W. R. 96, V. C. S.

4 *Mills v. Cobby*, 1 Mer. 3.

5 See *Robinson v. Lord Byron*, 2 Dick. 708.

6 *Spokes v. Banbury Board of Health*, 14 W. R. 128, V. C. W. For form of order, see *Seton*, 945, No. 2.

7 *Ante*.

8 *Robinson v. Lord Byron*, *ubi sup*.

9 *Stevens v. Workman*, 11 W. R. 508, V. C. K.

ferred with to the injury of the plaintiff's right; to this bill no answer was ever filed, but a motion to dissolve the injunction was made and refused, and in the same year the plaintiff recovered a verdict against the defendant at law, in respect of the same matters; an arrangement was then made between them that the dam should remain, and that each party should have the exclusive use of the water for a certain portion of every day, and this agreement was acted on for nearly seven years: the defendant then began to make a limited use of the water all day, and contended that from some improvements he had introduced into the machinery of his mill, this would not interfere with the plaintiff's rights; the plaintiff denied this, and moved to commit for contempt. *Held*, that the delay was no answer to the motion, that the defendant having abandoned the agreement, the plaintiff had a right to fall back on his injunction; that on this application the propriety of granting the injunction originally was not a proper subject of consideration, and the Court being of opinion that the continuance of the defendant's dam was a breach of the injunction, ordered the defendant to stand committed in two weeks, unless in the meantime he obeyed, the injunction.¹ A servant after leaving his master's service continues bound by an injunction issued while he was a servant against the master and his servants to restrain waste. Where an injunction forbids the cutting down of trees, it is no answer to a motion to commit for breach of the injunction, that the trees cut down in contravention of the writ were of little value. A servant who has notice of an injunction may be committed for breach of it, though he has not been served with the writ.² Where a party commits a breach of an injunction after service of the order upon his solicitor, but before personal service of the injunction upon the party enjoined, the Court will commit him for contempt.³ In this case, *Esten, V.C.*, held that notice to the solicitor that an injunction had been ordered was sufficient, and that the defendant having violated the order, was guilty of contempt, and he therefore granted the order *nisi*. No cause having been shown on the return of the order, an attachment was issued against the defendant for breach of the injunction. An attachment to commit a party for contempt will now be granted merely for non-payment of the costs of the con-

¹ *Gamble v. Howland*, 3 Grant, 281.
³ *Andrews v. Maulson*, 8 U. C. L. J. 74.

² *Brown v. Sage*, 12 Grant, 25.

tempt.¹ The difficulty in this case arose on Section 13 of the Act respecting Arrest and Imprisonment for Debt—ch. 24, of Con. Stat. U. C. An injunction while it stands should be obeyed; and where after twelve weeks had elapsed from the service of the injunction without the bill being served, the defendant treated the injunction as gone, the Court, while refusing a motion to commit for breach of the injunction, refused the defendant his costs of resisting the application. Where an *ex parte* injunction is granted before the bill is served, an office copy of the bill should be served with the injunction, or as soon as possible afterwards. Where an *ex parte* injunction was served on the 24th December, and the bill was not served up to the 13th May following, the injunction was dissolved for the neglect to serve.¹ After an injunction restraining the felling of timber had been issued, and on the same day the writ was served, the plaintiff entered into a written agreement with the principal defendant in the cause, by which the latter agreed to give up possession of the premises in question on a particular day, and to refrain from cutting or removing any timber out, in the meantime and the plaintiff thereby agreed “that I, the said T. M. do hereby, upon the above conditions being complied with, withdraw all suits, now pending,” &c. The defendant having, notwithstanding, continued to cut down and remove the timber, a motion was made to commit him for breach of injunction, when it was *held*, that the suit was still pending the acts agreed to be done by the defendant, being a condition precedent to the withdrawal of the suit.³

Stop Orders.

Where there are funds or securities in Court, it will in its own jurisdiction, without any statutory authority, exercise the power of issuing what are called Stop Orders.

Order 286 provides that “Where any stock, debentures, funds, securities, or moneys, are standing in Court to the credit of any cause, or to the account of any class of persons, or are invested in the name of the Registrar, or other officer of the Court, and an order is made to prevent the transfer or payment of such stock,

¹ *Dickson v. Cooke*, 1 Cham. Rep. 210.

² *Heron v. Swisher*, 13 Grant, 438.

³ *Mulholland v. Doumes*, 14 Grant, 106.

debentures, funds, securities, or moneys, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such stock, debentures, funds, securities, or moneys, the person by whom any such order shall be obtained, or the share of such stock, debentures, funds, securities or moneys affected by such order, shall be liable, at the discretion of the Court or a Judge, as the case may be, to pay any costs, charges and expenses, which by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any person interested in any such stock, debentures, funds, securities, or moneys."

Any person, although not a party to the cause or proceeding in which a fund in Court is standing, who has become entitled to any such fund, or a share thereof, or to any lien or charge thereon, may apply to that branch of the Court to which the cause or proceeding is attached, for an order to prevent the fund in question being paid out, or otherwise dealt with, without notice to the applicant.¹

A Stop Order will also be granted in favour of a judgment creditor, who has obtained a charging order at law, on a fund in Court;² and even where such a charging order had not been made, but the creditor had caused a writ of *fieri facias* to issue, the Court has stopped, at the instance of the creditor, payment of funds in Court to the debtor.³

A Stop Order will not, in general, be made, unless the fund is actually in Court;⁴ and, therefore, where a sum of money had been ordered to be paid by one party to another, the Court refused, at the instance of a person who had obtained a charging order on it, to order it to be paid into Court, for the purpose of giving him an

1 *Hobson v. Shearwood*, 8 Beav. 496; *Williams v. Symonds*, 9 Beav. 523; *Feistel v. King's College, Cambridge*, 11 Beav. 254; *Hoole v. Roberts*, 12 Jur. 108, V. C. E.; *Re Miller*, 6 W. R. 23; V. C. K.; *Re Blunt*, 10 W. R. 379, V. C. K.; *Hawkesley v. Gowan*, 12 W. R. 1100, V. C. K.; see also *Wells v. Gibbs*, 22 Beav. 204; *Miller v. Pridden*, 8 Jur. N. S. 78, V. C. K. Such an order has been made, on the application of the assignee of the interest of the sole next of kin of a lunatic: *Re Moore*, 1 M.N. & G. 108; *Re Pigott*, 3 M.N. & G. 268.

2 *Miles v. Presland*, 4 M. & C. 451; *Hulkes v. Day*, 10 Sim. 41; 4 Jur. 1125; *Whitfield v. Prichett*, 13 Sim. 269; *Watts v. Jeffreys*, 3 M.N. & G. 372; 15 Jur. 783; *Wells v. Gibbs*, 22 Beav. 204; *Lord Hastings v. Beavan*, 10 W. R. 206, L.J.J.; *Seton*, 962-969; and see *Warburton v. Hill*, Kay, 470; *Re Nowell*, 9 Jur. N. S. 512, 788; 11 W. R. 658, 796, V. C. K.

3 *Robinson v. Woode*, 5 Beav. 388; *Courtroy v. Vincent*, 15 Beav. 486; and for the order in the latter case, see *Seton*, 957, No. 8.

4 A Stop Order has, however, been made to restrain the payment of funds to be thereafter paid in, to a particular account: *Re Duke of Cleveland's Harte Estates*, cited Morgan, 489.

opportunity of enforcing his right against it by means of a Stop Order.¹

Applications for Stop Orders may be made by motion in Chambers, where the person whose fund or interest is to be affected consents, or joins in the application: in other cases, the application must be made by petition.

The petition must show the title of the person, the payment of whose fund is intended to be restrained: although it is not absolutely necessary that it should show the particular share of the fund to which he is entitled; and it must also show the title of the assignee.²

The Court must have proof of these facts, whether the application be made by petition or motion. The title of the assignor will usually appear from the proceedings in the cause: where this is not the case, the fact must be established by affidavit.³ The title of the assignee is generally proved by the person whose fund is to be affected either joining in the application, or appearing and admitting the fact: when this is not the case, it must, in the case of a petition, be proved in the regular way.⁴ To obviate the expense of a strict proof, it is now usual, where the applicant claims as assignee, for the assignment to give him the power to use the name of the assignor as an applicant.

It was formerly necessary, upon applications for Stop Orders, that the petitioner should give notice to all the persons interested in the fund; but Order 287 now provides that "A person applying for such order, shall not be required to serve notice thereof upon the parties to the cause, or upon the persons interested in such parts of the stock, debentures, funds, securities, or moneys, as are not sought to be affected by the order:" and the applicant must pay the costs of such other parties if they are served with the petition or notice of motion.⁵

1 *Newton v. Askew*, 11 Beav. 446: 12 Jur. 531, 786; *Wellesley v. Mornington* 11 W. R. 17, V. C. K.

2 *Wood v. Vincent*, 4 Beav. 419.

3 *Quarman v. Williams*, 5 Beav. 133.

4 *Wood v. Vincent*, *ubi sup.*; *Winchelsea v. Garrettty*, 1 Beav. 223.

5 *Glazbrook v. Gillatt*, 9 Beav. 611.

It is, however, still necessary to serve the person whose interest is intended to be affected, with a petition which is presented by the assignee alone.¹

The order, when duly passed and entered, or an office-copy, must be left at the Registrar's Office; and until this has been done, it does not take effect. The Registrar will, however, delay parting with a fund, if he has received notice of an intended application for a Stop Order.²

A Stop Order does not decide anything as to the rights of the parties; it is, therefore, in general, unnecessary to state that it is made without prejudice;³ but where the fund had been paid in under the Trustee Relief Act, the order was expressed to be made without prejudice to the trustees' lien for the costs.⁴ Where a husband and wife had, previously to the 20 & 21 Vic., ch. 57, assigned her reversionary *chose in action*, the operation of the order was limited to the lifetime of the husband.⁵

An incumbrancer, who has obtained a Stop Order, and duly served it on the Registrar, thereby obtains priority over a previous incumbrancer who has not done so;⁶ but this priority only extends to the charge in respect of which the Stop Order was obtained.⁷

A solicitor's lien, on a fund recovered by his exertions, has priority over a Stop Order obtained by an assignee from his client.⁸

This Court has no jurisdiction to grant a "Stop Order," at the instance of a judgment creditor of a party entitled to funds in Court.⁹

¹ *Parsons v. Groome*, 4 Beav. 521.

² *Seton* 952, 953.

³ *Lucas v. Peacock*, 9 Beav. 177.

⁴ *Re Blunt*, 10 W. R. 379, V. C. K.

⁵ *Moreau v. Polley*, 1 De G. & S. 143.

⁶ *Swayne v. Swayne*, 11 Beav. 463 and see *Greening v. Beckford*, 5 Sim. 195; *Hulkes v. Day*, 10 Sim. 41; 4 Jur. 1125; *Warburton v. Hill*, Kay, 470; *Elder v. Maclean*, 8 Jur. N. S. 226; 5 W. R. 447, V. C. K.; *Livesey v. Harding*, 23 Beav. 141; *Bartlett v. Bartlett*, 1 De G. & J. 127; 3 Jur. N. S. 705; *Day v. Day*, 1 De G. & J. 144; 3 Jur. N. S. 782; *Thompson v. Tompkins*, 2 Dr. & Sm. 8; *Thomas v. Cross*, 2 Dr. & Sm. 423; 11 Jur. N. S. 384, 385; but see *Grainage v. Warner*, 13 W. R. 833, V. C. S.

⁷ *MacLeod v. Buchanan*, 33 Beav. 234; 9 Jur. N. S. 1266; 10 Jur. N. S. 223; 12 W. R. 614, L.JJ.

⁸ *Haynes v. Cooper*, 33 Beav. 43; 10 Jur. N. S. 303.

⁹ *Lee v. Bell*, 2 Cham. R. 114; *Purkis v. Morrison*, 2 Cham. R. 117.

The applicant is not, in general, entitled to the costs of the Stop Order ; but they may be given him, where it has been rendered necessary by the conduct of the parties ;¹ or where his assignment authorises him to apply to the Court for it ; but they should be specially mentioned in the direction for taxation.²

The fund to which the Stop Order applies will not be paid out, or otherwise dealt with, until it is either directly discharged, or some order is made expressly directing the fund to be dealt with, notwithstanding the Stop Order. A person who has obtained a Stop Order must, therefore, be served with notice of any application to deal with the fund ; and at the hearing of the application the Court will either discharge the Stop Order,³ or direct payment to the person who has obtained it, according to what appears to be the rights of the parties ; or, if the rights of the parties cannot then be satisfactorily ascertained, it will direct the fund to be retained in Court, for a limited time, to give the claimant an opportunity of taking the necessary steps for asserting his claim.⁴

Where the person who has obtained a Stop Order afterwards assigns his interest in the fund affected thereby, the assignee may obtain a Stop Order in his favour on petition, or, by consent, on motion, supported by production of the former Stop Order, and an affidavit of his title. The order, in such case, either directs that the fund be not dealt with without notice to the assignee, instead of the person named in the former order ;⁵ or else, that the assignee be substituted, as the person to whom such notice is to be given.⁶

An order may be obtained to stay the delivery out, without notice to the applicant, of documents deposited with the Record and Writ Clerk,⁷ or the Registrar.⁸

A Stop Order will be discharged with costs, if it has been irregularly obtained.⁹

1 *Grimaby v. Webster*, 8 W. R. 725, V. C. K. ; *Hoole v. Roberts*, 12 Jur. 108, V. C. E.

2 *Waddilove v. Taylor*, 3 Hare, 307 ; *Morgan & Davey*, 47.

3 By consent, an order to discharge the Stop Order may be obtained on summons at Chambers ; and, *see*, in the case of purchase orders *ante*. For form of order, *see* *Seton*, 953, N. 6.

4 *Bathune v. Kennedy*, 3 Beav. 482 ; *Feistel v. King's College, Cambridge*, 11 Beav. 254 ; and *see* *Wastell v. Leslie*, 15 Sim. 453, n. ; *Thorndike v. Hunt*, 3 De G. & J. 555 ; 5 Jur. N. S. 879.

5 *Robertson v. Wynch*, M. R. in Chambers, 25 Feb. 1861, Reg. Lib. B. 382. The statement of this order in *Seton*, 967, No. 10, differs from Reg. Lib.

6 *Tench v. Gheese*, M. R. in Chambers, 26 Jan. 1865, Reg. Lib. B. 232.

7 *Lang v. Griffith*, cited *Seton*, 967. 8 *Williams v. Symonds*, 9 Beav. 523.

9 *Re Nowell*, 9 Jur. N. S. 788 ; 11 W. R. 896, V. C. K.

CHAPTER XXXVIII.

CONTEMPT.

Effect of a Contempt upon the Proceedings in the Cause.

Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the Court, he places himself in this further predicament : viz., that of not being in a situation to be heard, in any application which he may be desirous of making to the Court. Lord Chief Baron Gilbert lays it down, that "upon this head it is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt. and paid the costs : as, for example, if he comes to move for anything, or desires any favour of the Court."¹ Thus, in *Lord Wenman v. Osbaldiston*,² where a defendant, being in contempt for not putting in his examination pursuant to an order, to avoid a sequestration moved the Court that, upon his undertaking to pay in a week's time what should appear to be due to the plaintiff, all further process of contempt should be stayed, the Court declined making any order upon the motion, but directed the appellant to clear his contempt, and then move ; and this determination of the Court was affirmed by the House of Lords, upon appeal.

But where, after a petition had stood over at the request of the respondent's counsel, for his convenience, the petitioner incurred a contempt, which had not been cleared when the petition came on again, it was held, that the petitioner was, nevertheless, entitled to be heard ;³ and, it seems, that a party who is in contempt for non-payment of costs, is not thereby prevented from moving for leave to defend *in forma pauperis*.⁴

¹ *Gillb. For. Rom.* 192 ; *Fowles v. Young*, 9 Ves. 173, 172.

² 2 Bro. P. C. Ed. Toml. 278 : 2 Eq. Ca. Ab. 222, Pl. 1.

³ *Bristowe v. Needham*, 2 Phil. 190 : 1 C. P. Coop. & Cott. 236.

⁴ *Oldfield v. Cobbett*, 1 Phil. 613, 614.

The rule, that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily, and ask for an indulgence; and, therefore, a defendant cannot object to a cause being heard because the plaintiff is in contempt.¹

In like manner it has been held, that a mortgagee, defendant to a bill of foreclosure, who is in contempt, could not move, under the 7 Geo. II. ch., 20, for a reference to take an account of the principal and interest due upon the mortgage.² And so, where a party in contempt had applied for and obtained, the costs of an abandoned motion, under Lord Eldon's order,³ Sir Lancelot Shadwell, V. C., upon motion, discharged the order.⁴

So also, where a motion had been refused with costs, it was held, that the motion could not be renewed, though on different grounds, until the costs had been paid.⁵

It is to be observed, however, that the rule, that a party cannot move till he has cleared his contempt, is confined to proceedings in the same cause; and that a party in contempt for non-obedience to an order in one cause, will not be thereby prevented from making an application to the Court in another cause relating to a distinct matter, although the parties to such other cause may be the same;⁶ and this privilege has been carried to the extent of allowing a defendant, in each of two creditors' suits to administer the same estate, to move in one of them, in which he was not in contempt, to stay proceedings in the other, in which he was.⁷

It would seem that a plaintiff prosecuting his decree is entitled to do so, notwithstanding he may have been placed in contempt for disobedience to an order of the Court for payment of money.

1 *Ricketts v. Mornington*, 7 Sim. 200; and see the cases on this subject collected in 1 C. P. Coop. t. Cott. 298; see also *Futouye v. Kennard*, 2 Giff. 110; *Fry v. Ernest*, 9 Jur. N. S. 1171; 12 W. R. 97, V. C. W.

2 *Hewett v. McCartney*, 13 Ves. 560.

3 Gen. Ord. 5 Aug. 2818; *Sand. Ord.* 706; *Beav. Ord.* 3; now Ord. XL. 23.

4 *Ellis v. Walmsley*, 4 L. J. Ch. 60; S. C. *nom. Ellice v. Walmsley*, 1 C. P. Coop. t. Cott. 207, where the cases are collected as to the proceedings, for his own advantage, which a party in contempt cannot take.

5 *Oldfield v. Cobbett*, 12 Beav. 91, 95.

6 *Clark v. Deie* 1 R. & M. 103, 107; *Gompertz v. Best*, 1 Y. & C. Ex. 619; *Taylor v. Taylor*, 1 M'N. & G. 397, 409; 12 Beav. 220, 228; *Fry v. Ernest*, 9 Jur. N. S., 1151; 12 W. R. 97, V. C. W.

7 *Turner v. Dorgan*, 12 Sim. 504; 56 Jur. 386; *Morrison v. Morrison*, 4 Hare, 590; 9 Jur. 103; 1 C. P. Coop. t. Cott. 215, 217.

In such a case the defendant must obtain an order staying proceedings until the contempt is purged.¹

And although it is the general rule of the Court that parties must clear their contempt before they can be heard, yet the rule must not be understood as preventing their making application to the Court to discharge, on the ground of irregularity, the order, by their non-obedience to which their contempt has been incurred; therefore, where a defendant, in custody for a contempt in not obeying an order, to pay in money, applied to the Court to discharge him out of custody, on the ground of irregularity in the order (it having been made pending an abatement of the suit), he was not only heard, but the order for his discharge was made: though, under the circumstances, without costs.² In such cases, it is to be observed that, in making his application, the party in contempt ought to confine his motion to the object of getting rid of the order of which he complains; and that if he embraces other matters in his notice of motion, he will not be allowed to go into such other matters, till he has shown that the order upon which his contempt has been incurred was irregular.³

A plaintiff is, in England, entitled to sue out an attachment against a defendant for want of answer, although he is himself in custody for a contempt in non-payment of costs to him.⁴

It is also to be observed, that the circumstance of a party being in contempt, will not prevent his being heard in opposition to any special application which the other side may make, upon notice duly served upon him; and where a plaintiff had obtained, from a Vice-Chancellor, an order for payment of a sum of money into Court, against a defendant, who was in contempt, the Lord Chancellor allowed him to move to discharge that order, on the ground that it was a rehearing of the original application.⁵ So, also, where there is any irregularity in the prosecution of the decree or

¹ *Hurd v. Robertson*, 1 Cham. R. 3.

² *Wilson v. Metcalf*, MSS.

³ *Ibid.*: 1 C. P. Coop. t. Cott. 216: 4 Hare, 595.

⁴ *Wilson v. Bates*, 9 Sim. 54: 2 Jur. 107; 3 M. & C. 197, 204: 2 Jur. 319; and see 1 C. P. Coop. t. Cott. 220, where the cases are collected as to the proceedings, for his own advantage, which a party in contempt may take.

⁵ *Parker v. Dawson*, 5 L. J. Ch. 108; see also *Ex parte Chadwick*, 15 Jur. 597, V. C. K. B.; *Reese v. Hodson*, 10 Hare, App. 41; *Bickford v. Skeeves*, 10 Sim. 193, 196: S. C. nom. *Bickford v. Skeeves*, 3 Jur. 813; *Futsey v. Kennard*, 2 Giff. 110.

order obtained under the contempt, a party in contempt may be heard to obtain redress.¹

Where an order is made on a receiver for payment of a sum of money, the Court on default, will commit for a contempt of such order without requiring any further order to be issued.²

Although a party cannot move until he has cleared his contempt, yet he may give notice of his motion before he has done so ;³ and a party to whom costs are awarded, may proceed in the taxation, notwithstanding he may be in contempt.⁴

Although a defendant, not appearing or answering within the regular time, is frequently said to be in contempt, yet it does not seem that the contempt is actually incurred until the writ enforcing obedience to the orders of the Court has been sealed. Thus, after the regular time for answering has expired, provided no attachment has issued against a defendant, he may file a joint demurrer and answer :⁵ which, had process actually commenced, might have been taken off the file for irregularity.⁶

It seems, that a party in contempt can apply for the purpose of removing scandal from the records of the Court.⁷ Although it was held by Lord Cottenham, in *Wilson v. Bates*,⁸ that a plaintiff in contempt is not precluded from availing himself of the ordinary process to enforce an answer, it appears that the fact of his being in contempt may be made the ground of special application by the defendant to stay proceedings in the cause, until such contempt has been cleared.⁹ And in general, whenever a party in contempt is entitled to be heard, there exists a right of appeal, and applications may be made with immediate reference to the motion upon which he is so privileged to be heard, or for the purpose of obtaining evidence in support of it.¹⁰

1 *King v. Bryant*, 3 M. & C. 191, 195 : 2 Jur. 106.

2 *McIntosh v. Elliott*, 2 Grant, 398.

3 *Chuck v. Cremer*, 1 C. P. Coop. t. Cott. 247.

4 *Newton v. Ricketta*, 11 Beav. 67.

5 *East India Company v. Henchman*, 3 Bro. C. C. 372 ; *Sowerby v. Warder*, 2 Cox, 258.

6 *Curzon v. De la Zouch*, 1 Swanst. 185 : 1 Wils. C. C. 469 ; see also *Attorney-General v. Shield*, 11 Beav. 441, where it was held, that taking an office copy of the answer was not a waiver of the objection. But if he retain the office copy till the time for excepting to the answer for insufficiency has elapsed, the contempt will be waived : *Herrett v. Reynolds*, 2 Giff. 409 : 6 Jur. N. S. 880.

7 *Ewerett v. Prytherch*, 12 Sim. 363 ; *Cattell v. Simons*, 5 Beav. 396.

8 3 M. & C. 197, 204 : 2 Jur. 319 ; see also *Bickford v. Skewes*, 3 Jur. 818.

9 *Bradbury v. Shawe*, 14 Jur. 1042, V. C. K. B. ; *Puteoye v. Kennard*, 2 Giff. 110.

10 *Cattell v. Simons*, *ubi sup.*

In what manner Contempts in Process may be cleared, waived, or discharged.

An ordinary contempt in process, as it is a matter merely between the parties, may be cleared by the contemnor doing the act, by the non-performance of which the contempt was incurred, and paying to the other party the costs he has occasioned by contumacy.

The Court refused a motion to commit for breach of injunction, where the defendant made an affidavit of having complied with the writ, even though the affidavit was contradictory to a statement personally made by him, but the defendant was ordered to pay the costs of the motion, as his conduct had caused the motion to be made.¹

Where a party is in contempt for not bringing accounts into the Master's office, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into.² And when a party has been committed for not bringing in accounts, and it is shown by certificate that the accounts have since been brought in, it cannot be urged on a motion for his discharge that the accounts are insufficient. Nor will the payment of costs be made a condition precedent to his discharge.³ It is a sufficient clearing of contempt if a party has done the act ordered to be done, and paid the costs. It is not necessary that an order of Court clearing his contempt shall be made unless he has been in custody, when an order is necessary for his discharge.⁴ Where a defendant who had been in contempt for non-production of deeds, and afterwards produced, filed his affidavits and paid costs of contempt, moved to dismiss, and it was objected that he had not cleared his contempt, no order having been made to that effect, the Secretary overruled the objection.⁵

Where process has been issued against a defendant in contempt for want of appearance or answer, but has not been executed, the defendant should enter his appearance or put in his answer, and pay or tender to the plaintiff's solicitor the costs of the contempt,

¹ *Campbell v. Gorham*, 2 Grant, 408.

³ *Clark v. Clark*, 3 Cham. Rep. 67.

⁴ *Duncan v. Trott*, 2 Cham. Rep. 487.

² *Clancy v. Patterson*, 2 Cham. Rep. 217.

⁵ *Ibid.*

if the amount of such costs can be liquidated: as in the case of an attachment;¹ but if the amount of the costs cannot be ascertained, he should tender such a sum as will cover their probable amount.² If the plaintiff's solicitor accept the costs so tendered, it will be at the plaintiff's own risk if he afterwards puts the process into execution. If his solicitor refuse to accept the costs when tendered, it is necessary, in order that the defendant may, upon payment or tender of the plaintiff's costs of the contempt, be discharged from his contempt, that he should obtain an order for that purpose: otherwise, the contempt will continue.³ An order of this nature is made on motion of course, or on petition of course, upon the Record and Writ Clerk's certificate of the defendant's appearance or answer.⁴

The Court will not detain a person in gaol merely for the non-payment of money,—but in order to punish any one who has been guilty of a contempt of Court, it may imprison him for a stated period allowing him to be discharged if he pay the costs of his contempt before the expiration of such period. The Court will entertain applications affecting the liberty of the subject during long vacation. Poverty is no excuse for delay in making an application to the Court, as in such case the party can apply in *forma pauperis*.⁵

Where the process has been carried into effect, and the defendant is in actual custody, he cannot be discharged without an order: which must be obtained in similar manner,⁶ and which will direct the defendant to be discharged, upon payment or tender of the costs of the contempt. These costs are either fixed or taxed costs, according to the stage which the contempt process has reached: thus, if the defendant has merely been arrested on the attachment, the costs, as we have seen, are of a fixed amount; but if he has been brought up by the messenger, or upon *habeas corpus*, or by the Serjeant-at-Arms, he is liable to pay taxed costs.⁷

1 *Wilkin v. Nainby*, 4 Hare, 473, 475; 10 Jur. 735. The amount payable to clear a contempt, in England, on an attachment executed, is 13s. 8d.; *Brown v. Lee*, 11 Beav. 379; if not executed, 11s. 2d.; *Braithwaite's Pr.* 164; and 2s. 6d. extra for each additional defendant: *ib.*

2 *Wilkin v. Nainby*, *ubi sup.*; *Broughton v. Martyn*, 4 Bro. C. C. 290.

3 *Green v. Thompson*, 1 S. & S. 121.

4 *Green v. Thompson*, and *Wilkin v. Nainby*, *ubi sup.*

5 *Harris v. Myers*, 1 Cham. Rep. 229.

6 *Gray v. Campbell*, 1 R. & M. 323; *Edmondson v. Heyton*, 2 Y. & C. Ex. 8. But a defendant in contempt for want of answer, cannot file an answer and demurrer: *Curzon v. De la Zouch*, 1 Swans. 185, 193; *Vigers v. Lord Audley*, 2 M. & C. 49, 52; 1 Jur. 51; *Attorney General v. Shield*, 11 Beav. 441, 446.

7 *Wilkin v. Nainby*, 4 Hare, 473, 475; 10 Jur. 735; *Braithwaite's Pr.* 164.

If the parties can agree upon the amount, the defendant should pay it; but if they cannot, he should tender to the plaintiff such a sum as will cover the amount which will probably be allowed on taxation.

It would appear, moreover, that strictly in all cases of contempt, (except where, the defendant not being in custody, the plaintiff is willing to accept the answer and the costs tendered,) the defendant ought, upon filing an answer, to obtain an order for his discharge, on payment or tender of costs: as otherwise, the plaintiff may move to have the answer taken off the file for irregularity.¹

It is to be observed, that where process of contempt has been issued against a defendant for want of an answer, he is entitled to be discharged from his contempt immediately upon his putting in an answer, and paying or tendering the costs of his contempt; and the Court will not detain him in custody till the sufficiency of his answer has been decided upon;² unless he has already put in three answers, which have been found insufficient.³ If, however, the plaintiff takes exceptions to the answer, and the answer is held insufficient, he will be entitled to resume the process of contempt where it left off;⁴ and so he will, where the defendant submits to answer the exceptions.⁵ Nor will the acceptance of costs be considered as a waiver of the contempt by the plaintiff: for, where a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, the plaintiff cannot be compelled, in case the answer is insufficient, to recommence the process of contempt against the defendant, but is at liberty to take up the process at the point to which he had before proceeded.⁶

A party who was in contempt to an attachment for not bringing accounts into the Master's office for the purpose of a reference, afterwards filed the same with the Master, but neglected to pay the opposite party the costs of the proceedings to put him into contempt,

¹ *Haynes v. Ball*, 5 Beav. 140; *Wilkin v. Nainby*, *ubi sup.*; *Coyle v. Alleyne*, 16 Beav. 548.

² *Dupont v. Ward*, 1 Dick. 133; *Child v. Brabson*, 2 Ves. 8. 110; *Boehm v. De Tastet*, 1 V. & B. 324, 327.

³ *Bailey v. Bailey*, 11 Ves. 151.

⁴ *Anon.*, 2 P. Wms. 481; *Wallop v. Brown*, 4 Bro. C. C. 212, 223; *Bromfield v. Chickester*, 1 Dick. 379; *Bailey v. Bailey and Boehm v. De Tastet*, *ubi sup.*; *Coulson v. Graha*, 1 V. & B. 331; *Taylor v. Salmon*, 3 M. & C. 109.

⁵ *Waters v. Taylor*, 16 Ves. 417.

⁶ English Ord XII. 7.

and a motion was now made *ex parte* for an order to remove the accounts so brought in from the files in the Master's office in order that the party might be proceeded against for the contempt. The order was granted.¹

But although a plaintiff does not now, by accepting the costs from a defendant upon his putting in an answer, forfeit his right to recommence the process of contempt at the point where it left off, yet if, after answer put in he accepts the answer, or takes a step in the cause, he waives the contempt, and cannot renew the process, or take any other advantage of it. Thus, if a plaintiff reply to the answer,² or move upon an admission contained in it,³ he waives the contempt; and so, where a messenger had been ordered upon a return of *cepi corpus*, and in the meantime the defendant filed his answer, which the plaintiff accepted, and then applied for his costs by motion, it was held, that the acceptance of the answer precluded him from his right to costs.⁴ And where a defendant, who was in contempt, put in an answer, without paying or tendering the costs, and the plaintiff replied to the answer, but did not proceed with the cause for three terms, whereupon the defendant moved to dismiss the bill for want of prosecution: upon the plaintiff's objecting that the defendant could not make the motion, in consequence of his being still in contempt, Lord Eldon held, that the contempt was gone, and that the defendant was in a situation to make the motion.⁵ It has been held, however, that the mere fact of the plaintiff bespeaking a copy of the answer does not operate as a waiver of the contempt.⁶

Where a plaintiff accepted the answer, without insisting upon the costs of the contempt, Lord Eldon held that the plaintiff had not thereby given up his right to the costs, as costs in the cause, but had only waived his right to enforce them by means of the process of contempt.⁷ And where a defendant, in contempt for want of an answer, had put in three insufficient answers, and pending a

¹ *Corbett v. Myers*, 1 Chanc. Rec. 26.

² *Haynes v. Ball*, 5 Beav. 140.

³ *Hoskins v. Lloyd*, 1 S. & S. 393; *Chuck v. Cremer*, 1 C. P. Coop. t. Cott. 247, and see *Woodward v. Twinaine*, 9 Sim. 301: 14 Jur. 20; *Herrett v. Reynolds*, 2 Giff. 409: 6 Jur. N. S. 880.

⁴ *Smith v. Blofield*, 2 V. & B. 100.

⁵ *Anon*, 15 Ves. 174; and the practice is the same, whether the defendant be actually in custody or not; *Oldfield v. Cobbett*, 1 Phil. 557.

⁶ *Woodward v. Twinaine*, and *Herrett v. Reynolds*, *ubi sup*.

⁷ *Anon*, 15 Ves. 174; see also *Smith v. Blofield*, *ubi sup*.

reference of the fourth, put in the fifth answer, which was accepted by the plaintiff, upon which a motion was made that the defendant might pay the costs of the contempt, and of the four insufficient answers, Sir Thomas Plumer, V. C., held, that he could not accede to the motion.¹

In the case of *Livingston v. Cooke*,² it appears that Sir Lancelot Shadwell, V. C., decided, that a mere order to amend the bill did not operate as a waiver of the contempt: upon the ground that it creates no obstacle to the defendant putting in his answer; it was admitted, however, that an order to amend, and for the defendant to answer the exceptions at the same time, does operate as a waiver of the contempt, as it prevents the defendant from putting in his answer.

It is to be observed, that a step taken in the cause must, in order that it may have the effect of a waiver of contempt, be in the cause itself in which the contempt has been incurred; therefore, where a plaintiff was in contempt for non-payment of some costs, the filing of a cross bill by the defendant was held not to be a waiver of the contempt by the defendant, so as to permit the plaintiff to make a motion in his own cause.³

Where any of the processes of contempt before referred to have been irregularly issued, the defendant should apply to the Court on motion, and notice to the plaintiff, supported by affidavit, to set them aside or discharge them with costs; and we have seen, that the circumstance of his being in contempt will not preclude his making such an application.

Where a sole plaintiff died, leaving a sole defendant in custody for contempt, he was ordered to be discharged from prison, on his own motion, supported by affidavit proving these facts.⁴

It is to be observed, that the Court will not permit the regularity of its process to be decided upon by any other tribunal; and there-

1 *Const v. Ebers*, 1 Mad 530, 531. It seems, however, that according to the practice, in taxation as between party and party, the costs of the contempt, even where there is a decree for the plaintiff with costs, will not be allowed him as costs in the cause: *Attorney-General v. Lord Carrington*.

2 9 Sim. 468; but see *Symonds v. Duchess of Cumberland*, 2 Cox, 411.

3 *Gompertz v. Best*, 1 Y. & C. Ex. 619.

4 *Terrell v. Souch*, 4 Hare, 535.

fore, in *Froud v. Lawrence*,¹ where a defendant, who had been taken into custody upon an attachment which was irregularly issued, obtained an order to discharge the attachment with costs, and afterwards commenced an action against the plaintiff and the sheriff, for false imprisonment, and another action against the plaintiff for maliciously suing out the attachment: Lord Eldon, upon the authority of *Bailey v. Devereux*,² and *May v. Hook*,³ made an order for an injunction to restrain the defendant from proceeding with his actions at Law. His Lordship, however, held that, by such an injunction, the Court does not intend that the persons concerned in issuing the attachment are not to make the party satisfaction; but only that it should not be done by an action at Law: because "it is impossible, from the nature of the thing, that they can try the regularity of an attachment in a Court of Law;" and he, therefore, ordered, that the injunction should be without prejudice to any application that the defendant might be advised to make for compensation, or for the costs at Law. The same principle was afterwards acted upon by Lord Lyndhurst, in *Ex parte Clarke*.⁴ It seems, however, that leave will be given to bring an action for the damages suffered by the irregular process, if the Court considers that the question can be better adjudicated upon at Law.⁵

It is to be remarked that, in *James v. Philips*,⁶ where the irregularity in the process had been occasioned by one of the Registrars of the Court not entering the attachment, although he or his agent had received the usual fee for so doing, the Court ordered the Master to tax the defendant's costs out of pocket, and directed that they should be paid by the plaintiff, who was reported to have been guilty of the irregularity, but that they should be paid over to the plaintiff by the Registrar; after this the Registrar died, and the costs having been taxed at 58*l.*, the matter came on again upon petition, when the Court being of opinion that, as the Registrar had received his fee, his omitting to enter the attachment was a breach of contract, and not a mere personal neglect, made an order

1 1 J. & W. 655.

2 1 Vern. 269: 1 J. & W. 680, n.

3 Cited 2 Dick. 619; reported 1 J. & W. 663, n.

4 1 R. & M. 563, 570; and see *Moore v. Moore*, 25 Beav. 8: 4 Jur. N. S. 250; *Walker v. Micklethwait*, 1 Dr. & S. 49; see also *Arrowsmith v. Hill*, 2 Phill. 609, 612; *Ex parte Van Sandau*, 1 Phill. 445, 448, n.: 9 Jur. 193.

5 *Whitehead v. Lynes*, 11 Jur. N. S. 74: 13 W. R. 206, M. R.

6 2 P. Wms 657. As to the responsibility of public officers, see *Tobin v. The Queen*, 16 C. B. N. S. 310; 10 Jur. N. S. 1023.

for payment, by the administratrix, out of the Registrar's assets ; and there being no one in Court to admit assets for her, it was ordered that she should be examined as to assets.

If a party wishes to discharge a process for irregularity, he must make his application before he complies with it : otherwise, he will be considered as waiving the irregularity.¹ Thus, where a defendant has been taken upon process of contempt for non-appearance, he must not enter his appearance in the ordinary way : otherwise, his appearance will cure the defect ; he must, however, submit himself to the jurisdiction of the Court, in such a manner that, if his objection is held invalid, the plaintiff shall not be deprived of the benefit of his process. The Court, therefore, before the Orders of August, 1841, required the defendant, before moving to discharge the attachment, to enter a conditional appearance with the Registrar :² the effect of which was, to enable the plaintiff, in case the Court should decide that the process had been regularly issued, to send the Serjeant-at-Arms at once, without any intervening proceeding ; but the 7th of those Orders³ provided, that no order should thereafter be made for the Serjeant-at-Arms to take the body of a defendant, to compel appearance. Accordingly, in the case of *Price v. Webb*,⁴ Sir James Wigram, V. C., directed, that the order for liberty to enter the conditional appearance should be made, upon the consent of the defendant to submit to any process which the Court might direct to be issued against him, for want of appearance, in case the *subpoena* should not be set aside for irregularity.

Query.—Whether a party whose committal has been ordered for breach of an injunction, and against whom a sequestration has been granted for the same contempt, can move against the writ before clearing his contempt ?⁵

It is to be observed, that a subsequent appearance by a party cannot be construed to have a relation back, so as to bring him into contempt for disobeying a writ or other process issued before

1 *Anon.* 3 Atk. 567 ; *Floyd v. Nangle*, *ib.* 569 ; *Dound v. Wells*, 3 Mad. 434 : *Robinson v. Nash*, 1 Anst. 76.

2 *Davidson v. Marchioness of Hastings*, 2 Keen, 509.

3 New English Ord. X. 10.

4 2 Hare, 511 : and see *Braithwait's* Pr. 321.

5 *Prentiss v. Brennan*, 1 Grant, 497, and 428.

his waiver of the informality had made the process valid against him ; and therefore, where an attachment was issued against a defendant for non-appearance to a *subpœna*, which had been issued against him, and in which he was described by a wrong name, it was held, by the Court of Exchequer, that his appearance for the purpose of discharging the attachment would not relate back, so as to cure the defect in the *subpœna*, and bring him into contempt for not appearing in time.¹

It should be noticed also, that the principle of waiver applies only to an irregular, and not to an erroneous order ; and therefore, where an order had been made that service upon the attorney should be good service, and service was accordingly effected upon the attorney, who thereupon entered an appearance, but it was found, afterwards, that the affidavit upon which the order for substituted service had been made was insufficient, whereupon the defendant moved to set aside that order and all the subsequent proceedings : Sir John Leach, V. C., made the order, on the ground that the original order was erroneous, and not irregular ; and that, being erroneous, the defect was not cured by the subsequent appearance of the party.²

A party is not in contempt for non-compliance with the order of Court, until the opposite party by some step brings him into contempt ; if such party omits to do this, he cannot urge the contempt in bar to a proceeding by the party so in default, or urge it in extenuation of his own laches.³

¹ *Robinson v. Nash*, 1 Anst. 76.

² *Levi v. Ward*, 1 S. & S. 334 ; see *Whittington v. Edwards*, 3 De G. & J. 242.

³ *Gillespie v. Gillespie*, 2 Cham. Rep. 267.

CHAPTER XXXIX.

THE WRIT OF NE EXEAT PROVINCIA, OR WRIT OF ARREST.

When issued.

A *Ne exeat provincia* is a writ which issues to restrain a person from going out of the province without the leave of this Court. It is a high prerogative writ: which was originally applicable to purposes of State only, but was afterwards extended to private transactions.¹

A *ne exeat* issues, only, where the claim upon the party going abroad is equitable; and it will be refused upon a mere demand at Law for money: for there, it is said, "the defendant may be arrested, and obliged to give bail: who will be liable, unless they surrender him; and he may be as easily taken by that process as on a *ne exeat*."²

It is not, however, the mere circumstance, that the defendant may be arrested and held to bail at Law, which induces the Court to refuse a *ne exeat* for a legal demand. It will not even grant it in cases where the defendant is not liable to arrest.³

The Court will issue the writ wherever one party has a claim against another, which he can only enforce in a Court of Equity. Therefore, where a man had executed a bond to the trustees of his marriage settlement, a party, beneficially interested in the money secured by it, was allowed to have a *ne exeat* against the obligor.⁴ It is, however, to be observed, that, in a case where a bill was filed

1 *Ex parte Brunker*, 3 P. Wms. 318; *Anon.*, 1 Atk. 521; *Jackson v. Petrie*, 10 Ves. 164; *Benson v. Ne exeat*, 19.

2 Per Lord Hardwicke, in *Pearne v. Pisle*, Amb. 75; see also *Brooker v. Hamilton*, 1 Dick. 154; *Greaves v. Stritho*, 2 Dick. 469; *Ex parte Duncombe*, ib. 503; *Crosley v. Marriott*, ib. 689; *Ex parte Brunker*, *ubi sup.*; *Anon.*, 2 Atk. 210; S. C. *nom.* *King v. Smith*, 1 Dick. 82; *Anon.*, 1 Bro. C. C. 376; *Atkinson v. Leonard*, 3 Bro. C. C. 218; and see 1 & 2 Vic. c. 119; *Chitty's Arch.* 750, *et seq.*, and Absconding Debtors Arrest Act, 1851 (14 & 15 Vic. c. 52): *Chitty's Arch.* 808, *et seq.*

3 *Gardner v. —*, 15 Ves. 444.

4 *Leake v. Beake*, 1 J. & W. 605; and see *Grant v. Grant*, 3 Russ. 598.

by a residuary legatee against the executor and a debtor to the estate, stating that, by collusion between them, the debt was suffered to remain unpaid, and that the debtor was about to leave the country, Lord Eldon refused the application for a *ne exeat*, saying, he did not know any instance where it had been done.¹ It is to be recollected, that the foundation of the equity in this case was the collusion, alleged in the bill, between the executor and the debtor: his Lordship's decision, therefore, was probably governed by the principle laid down by him in a case, mentioned by Mr. Beames,² in which the plaintiff filed his bill on the ground of fraud, stating a large balance to be due to him from the defendant; and Lord Eldon refused the writ.

It seems that, where, upon the taxation of a solicitor's bill, he appears to have been over-paid, the Court will grant a *ne exeat* to prevent his going abroad without requiring a bill to be previously filed.³

The Arrest and Imprisonment for debt Act (Consolidated Statutes U.C., ch. 24) provides for the issue of writs of *ne exeat provincia*. Sections 8, 9, 10 and 11, point out in what cases they are to issue, the limit of bail in cases of alimony, and the conditions of the bail bond, to which the reader is referred. The 5th section specifies the particulars which must be established to the satisfaction of a Judge before he will issue an order for a writ of arrest (as writs of *ne exeat* are called by the Statute): and the English cases must be read in connexion with this Statute, or otherwise the practitioner may be misled. In framing the affidavit for the order the practice and decisions in the Common Law Courts under Section 5 will form a guide, as the rules which govern at law will be followed in this Court.

M. having by fraud induced H. to advance money on mortgage upon the assurance that the title was correct, although well aware that the party executing the mortgage had no title, a writ of *ne exeat* was issued against him. A motion to discharge the writ on

¹ *Graves v. Griffith*, 1 J. & W. 646.

² *Beames on Ne exeat*, 52. See also *Jackson v. Petrie*, 10 Ves. 164.

³ *Lloyd v. Cardy*, Proc. in Ch. 171; but see *Ex parte Bruncker*, 3 P. Wms. 312.

the ground that the bill alleged that the debt arose out of the fraudulent conduct of the defendant, was refused with costs.¹

Although the Court will not grant a *ne exeat* where the demand is at Law, it will not refuse it merely because the plaintiff might have relief at Law, if the case be one in which the Court of Chancery has a concurrent jurisdiction : as in the case of a suit for an account.² So, also, the Court will grant the writ upon a bill to recover the amount due upon a bond which has been lost ; although, by the present practice of the Courts of Law, a plaintiff may now declare upon a lost bond, which he could not do formerly : for the Court of Chancery does not consider that the circumstance of a Court of Common Law having, by an extension of its rules, acquired a concurrent jurisdiction, is sufficient to defeat the jurisdiction in Equity.³

The same principle will also extend to cases of specific performance : for although, in such cases, the vendor may have a right to proceed at Law for the recovery of his purchase-money, yet, as Equity has a concurrent jurisdiction in such matters, a *ne exeat* will be issued to restrain the purchaser from going abroad till he has given security for the amount of his purchase-money.⁴ There appears to have been some doubt whether, in cases of this description, the Court will grant the writ before there has been some decree establishing the plaintiff's right to specific performance ; and it seems that the writ should not be granted, unless the Court can make it out to be quite clear that there must be specific performance.⁵

The writ will be granted, although the defendant has other property than that which is the subject of the suit ; and it does not make any difference that, in such a case, the vendor has in Equity a lien upon the property sold for the amount of his purchase money, which he may enforce by selling the property ; and it seems that, even where the defendant has a claim for an abatement

¹ *Hunter v. Mountjoy*, 6 Grant, 433.

² *Jones v. Alephain*, 16 Ves. 470 and see *Jones v. Sampson*, 8 Ves. 503 ; *Russell v. Asby*, 5 Ves. 96 ; *Anselme v. Barklay*, 8 Ves. 597 ; *Hannay v. McEntire*, 11 Ves. 55 ; *Howden v. Rogers*, 1 V. & B. 129 ; *Dick v. Swinton*, *ib.* 371.

³ *Atkinson v. Leonard*, 3 Bro. C. C. 218, 224.

⁴ *Bohm v. Wood*, T. & R. 332, 336, 346 ; see also *Raynes v. Wyse*, 2 Mer. 479 ; and *Goodwin v. Clarke*, 2 Dick. 497 : which, however, appears not to have been rightly decided : see T. & R. 345.

⁵ *Morris v. McNeil*, 2 Russ. 604 ; and see *Goodwin v. Clarke* ; *Raynes v. Wyse*, and *Boehm v. Wood*, *ubi sup.*

out of the purchase-money, which however has not been ascertained, the writ will be granted for the whole.¹

An attempt has been made to extend the principle, that, in the case of a suit for the specific performance of an agreement, the Court will grant the writ, to a suit for the specific performance of a covenant to indemnify; but the Court was of opinion that the right of a party, entitled, by agreement, to satisfaction by way of damages for the non-performance of the agreement, to come into Equity to enforce that satisfaction, was extremely doubtful; and held that, although, where the equity is clear, but the facts are in dispute, the writ may be sustained, yet, that where the equity is matter of grave doubt, the plaintiff, however specific his allegation may be, cannot, generally speaking, have the writ.²

But, although the Court of Chancery will grant this writ in cases where the Court has concurrent jurisdiction with the Courts of Law, it will not permit the defendant to be harassed by a *ne exeat*, where he has already been held to bail in a Court of Law for the same demand; and if, under such circumstances, the writ has been issued, it will be discharged. Therefore, where the defendant had entered into a contract with the plaintiff for the purchase of an estate, and the plaintiff had arrested him at Law and held him to bail for the amount of the purchase-money, which bail was afterwards discharged in consequence of the plaintiff having discontinued the suit, a writ of *ne exeat*, subsequently obtained by the same plaintiff upon a bill to enforce the same contract was discharged.³ So, also, where a defendant had been held to bail at Law, in an action commenced against him by the plaintiff, for the balance of an account, and it was afterwards found more convenient to proceed in Equity, whereupon the defendant was discharged from his arrest at Law, and a *ne exeat* was issued against him by the Court of Chancery, Lord Eldon discharged the writ.⁴

A writ of *ne exeat* may, however, be granted against a defendant who has been arrested at Law, if his arrest has taken place in respect of another demand.⁵

¹ *Boehm v. Wood*, T. & R. 338: and see *Goodwin v. Clarke*, 2 Dick. 407.

² *Jenkins v. Parkinson*, 2 M. & K. 5.

³ *Raynes v. Wyse*, 2 Mer. 472.

⁴ *Amsinck v. Barklay*, 8 Ven. 504.

⁵ *Houkings v. Houkings*, 1 Dr. & Sm. 75: 6 Jur. N. S. 400.

In order to authorize the issue of a *ne exeat*, the demand must not only be equitable, but it must be a pecuniary demand ; therefore, the Court has refused to grant the writ, upon a bill to enforce an agreement by which the defendant had undertaken to give the plaintiff a bill of exchange, as a security for a demand.¹

And the demand must not only be pecuniary, but it must be actually due.² The writ will not be issued in respect of a claim which is merely contingent : therefore, where it was nothing more than the demand of a wife against her husband, by virtue of a marriage agreement, in case she survived him, Lord Hardwicke refused the application : as the contingency was one which might never happen.³ The writ may, however, be issued in respect of an interest which is vested, although subject to be divested.⁴ Where the debt's becoming due does not depend upon a contingency, but is certain, yet, if it is payable *in futuro*, the writ cannot be granted : and, therefore, a *ne exeat* to restrain the defendant from going abroad, for the purpose of evading the payment of a sum of money which he had been ordered to pay into a banking house, as the condition of the Court's granting an injunction, was refused : because the time when the party was bound by the order to pay the money, namely, a month from the date of the order, had not arrived.⁵ It would seem, however, that if, between the date of an order for an injunction and the payment of the money into Court at a future time, there is a substantial threat that the party, who ought to pay, will go abroad, the practice of the Court is to order him to pay the money *instantly*, or to dissolve the injunction.⁶

To entitle the plaintiff to the writ, he must be in a situation either to swear positively that so much is actually due,⁷ or in some other manner to point out to the Court the sum to be marked on the writ.⁸ The only exception to the rule, which requires that the plaintiff should be in a situation to swear positively that a certain sum of money is due, is in the case of a suit for an account : in

¹ *Blaydes v. Calvert*, 2 J. & W. 211.

³ *Anon.*, 1 Atk. 521.

⁵ *Whitehouse v. Partridge*, *ubi sup.*; and see *Cock v. Ravis*, 6 Ves. 235; *Dawson v. Dawson*, 7 Ves. 173; *Haffey v. Haffey*, 14 Ves. 261.

⁶ *Whitehouse v. Partridge*, *ubi sup.*

⁷ *Rico v. Gualtier*, 3 Atk. 601; *Anon.*, 1 Bro. C. C. 376; *Sherman v. Sherman*, 3 Bro. C. C. 370; see also *Butler v. Butler*, cited in *Beames on Ne exeat*, 52.

⁸ *Boehm v. Wood*, T. & R. 332.

² *Whitehouse v. Partridge*, 3 Swanst. 365, 377.

⁴ *Houkings v. Houkings*, 1 Dr. & Sm. 75.

which it will be sufficient, if the plaintiff can swear that, according to the best of his belief, any particular sum, at the least, would be found justly due to him upon a balance, if the account was taken;¹ but the writ will not be issued if the account is contested; nor unless it appears, on the defendant's own showing, that something is due from him.²

This writ was originally applied only to persons domiciled in this country; but for a long course of years it has been settled, that, if a man living in Scotland,³ or Ireland,⁴ or in our colonies, or in other parts of our dominions,⁵ or abroad,⁶ comes here, the writ of *ne exeat* may issue against him: although he comes here for a particular purpose only, and intends to return immediately.

Upon this principle, the writ has been issued at the instance of an inhabitant of one West India colony against an inhabitant of another, who was only here for a casual purpose.⁷ It was formerly thought, that, where the debt was contracted abroad, and might have been recovered in the Courts there, the writ should not be issued.⁸ It is, however, now settled, that a writ of *ne exeat* may issue against any defendant whose residence is out of England, in respect of a debt contracted abroad and recoverable there.⁹

It seems also, that the writ will be granted where the plaintiff is an Englishman, and the defendant a foreigner;¹⁰ but whether it can be granted, where the plaintiff and defendant are both foreigners, and the debt was contracted in their own country, appears to be doubtful:¹¹ although, if the question is between two foreigners, but the subject matter has risen in this country, the writ will be granted.¹²

1 *Rico v. Gualtier*, 3 Atk. 501, and *Butler v. Butler*, cited in *Beames on Ne Exeat*, 52; *Jackson v. Petrie*, 10 Ves. 164; but see *Whitehead v. Bennett*, 10 Jur. 2, V. C. R.

2 *Thompson v. Smith*, 11 Jur. N. S. 276: 13 W. R. 422, M. R.

3 *Mackintosh v. Ogilvie*, 1 Dick. 119; *Done's case*, 1 P. Wms. 263.

4 *Howden v. Rogers*, 1 V. & B. 129; but see *Bernal v. The Marquis of Donegal*, 11 Ves. 43, where it was refused on the ground of parliamentary privilege: the defendant being a representative in Parliament of an Irish borough.

5 Per Lord Eldon, in *Flack v. Holm*, 1 J. & W. 406, 415.

6 *Houkine v. Houkine*, 1 Dr. & Sm. 78: 6 Jur. N. S. 490: *Anon.*, 4 De G. & S. 547.

7 *Atkinson v. Leonard*, 3 Bro. O. O. 218.

8 *Robertson v. Wilkie*, Amb. 177: 2 Dick. 738. See also *Pearne v. Lisle*, Amb. 76.

9 *Howden v. Rogers*, *ubi sup.*; but see *Vanzeller v. Vanzeller*, 16 Jur. 115, V. C. K. B.

10 *Flack v. Holm*, *ubi sup.*

11 *Flack v. Holm*, 1 J. & W. 405, 417; and see *Talleyrand v. Boulanger*, 3 Ves. 447: 4 Ves. 586: 1 J. & W. 417; *Vanzeller v. Vanzeller*, 16 Jur. 115, V. C. K. B.

12 *De Carriere v. De Calonne*, 4 Ves. 577, 591.

Semble, that the bail of a defendant who has been arrested on a writ of *ne exeat* cannot be discharged from their bonds upon the defendant rendering himself to the custody of the Sheriff.¹ The writ of *ne exeat* granted after filing a bill in an alimony suit remains in force after decree; but it is no objection that the wife resides out of the jurisdiction, as during coverture, the domicile of the husband is the domicile of the wife.²

The writ will not be issued where the plaintiff is resident abroad;³ and where the writ had been issued at the instance of a plaintiff who was resident in Jamaica, against a defendant who was resident in the same colony, it was discharged, on the ground that the plaintiff resided abroad, and that his visit to this country was colorable and temporary only.⁴ The same rule has been acted upon in subsequent cases.⁵

The writ may be issued against a party who is going abroad in the course of his ordinary business.⁶

A writ of *ne exeat* will not be granted against a *feme covert* administratrix.⁷ The question whether it will be granted, at the suit of a *feme covert*, against her husband, has been much discussed; and in a case before Lord Thurlow, he refused to grant the writ at the instance of a *feme covert* administratrix against her husband, on her affidavit that he had possessed the assets and was going abroad.⁸ The decision proceeded upon the ground that the evidence of the wife could not be received against the husband. There seems, however, no reason why, in the cases in which the Court of Chancery recognises the right of a wife to maintain a suit against her husband: as when she has property settled to her separate use: the Court should not allow the wife to make an affidavit in support of an application to restrain the husband from

1 *McDonald v. McDonald*, 1 Cham. Rep. 22.

2 *Ibid.*, 5, U. C. L. J., 68.

3 *Hyde v. Whitfeld*, 19 Ves. 342.

4 *Smith v. Nethercole*, 2 R. & M. 450.

5 *Walker v. Christian*, and *Douglas v. Terry*, 2 R. & M. 450, n.; *Walker v. Christian*, 7 Sim. 367.

6 *Stewart v. Graham*, 19 Ves. 315; *Dick v. Swinton*, 1 V. & B. 371; see also *Tomlinson v. Harrison*, 8 Ves 62; *Elches v. Lance*, 7 Ves, 417; *Lloyd v. Cardy*, Free. in Ch. 171; *Baker v. Dumaresque*, 2 All. 66.

7 *Pannell v. Tayler*, T. & R. 96.

8 *Sedgwick v. Watkins*, 3 Bro. C. C. 11; 1 Ves. J. 49.

defeating his wife's right, by removing out of the jurisdiction of the Court.¹

The writ will be granted on the application of a lunatic by his committee: the affidavit being made by the committee;² and the Court may direct the writ to issue, wherever a party has made himself liable to the debt of another: even though he has not been called upon to pay the demand.³

In order to entitle a plaintiff to a writ of *ne exeat* he must, by his bill, give the defendant all the information in his power: so that he may have a reasonable opportunity of meeting it, as distinctly and rapidly as possible.⁴

It is not necessary that the writ should be prayed by the bill: although, where the application is intended to be made immediately on the filing of the bill, it is usual to do so, if, at the time of filing the bill, the plaintiff is aware of the defendant's intention to go abroad.⁵ It frequently happens, however, that the defendant's intention to go abroad arises, or is first discovered, in the course of the suit, and then there is no doubt that the writ would be issued, though not asked for by the bill.⁶

In general, the writ will only be issued at the instance of the plaintiff, and upon a bill filed;⁷ but it has been stated, and not denied, that it can be obtained by a defendant against the plaintiff;⁸ and it seems that, in matters of account, it may be obtained by a defendant against a co-defendant.⁹ It has also been granted in a suit commenced by an administration summons;¹⁰ and against a contributory, under the Winding-up Act.¹¹ Where, also, upon the taxation of a solicitor's bill, he was reported to have been overpaid,

1 In *Bagot v. Bagot*, where real estate was settled to the separate use of a married woman, Sir Lancelot Shadwell, V. C., granted a receiver against the husband, before answer, upon notice: the facts of the case being verified by the affidavit of the wife alone: MS. December, 1838; and see *Shafte v. Shafte*, 7 Ves. 171; *De Manneville v. De Manneville*, 10 Ves. 56; and Mr. Bell's note to *Sedgwick v. Watkins*, 3 Bro. C. C. 11.

2 *Stewart v. Graham*, 19 Ves. 313.

3 *Sealy v. Laird*, 3 Swanst. 368, n.

4 *Anderson v. Stamp*, 11 Jur. N. S. 169, V. C. W.

5 *Moore v. Hudson*, 6 Mad. 218; *Barned v. Laing*, 13 Sim. 256; 7 Jur. 393; *Whitehead v. Bennett*, 10 Jur. 3, V. C. E.; *Houkins v. Houkins*, 8 W. R. 403, V. C. K.; but see *Sharp v. Taylor*, 11 Sim. 60, as explained in 13 Sim. 257.

6 *Collinson v. .*, 18 Ves. 353.

7 *Ex parte Bruncker*, 3 P. Wms. 312; *Anon.*, 6 Mad. 276.

8 *Whitehouse v. Partridge*, 3 Swanst. 365, 374.

9 2 Eq. Ca. Ab. 5, pl. 8, *Dome's case*, 1 P. Wms. 263.

10 *Re Greasby, Cleaver v. Younger*, 27 Dec. 1852, V. C. K.; *Seton*, 961; *Braithwaite's Pr.* 232.

11 *Mawer's case*, 4 De G. & S. 349; and see "The Companies Act, 1862," (26 & 27 Vic. c. 39) ss. 118, 119.

the client obtained a *ne exeat*, to prevent his going abroad, though there was no bill in Court whereon to ground the writ.¹ In this last case, however, the demand was capable of being enforced by means of the authority exercised over solicitors as officers of the Court.

How granted.

The application for a writ of *ne exeat* is made by an *ex parte* motion, and may be made before service of the copy of the bill; the reason of which is, that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction.² For the same reason, notice of the motion is not required, even after the defendant has appeared;³ but the application should be made as promptly as possible,⁴ and must be supported by evidence (which is usually given by affidavit), of the existence of the debt, and of the intention of the party to go abroad.⁵ It does not appear to be necessary that an affidavit in support should be made by the plaintiff himself: although it is usually made by him, unless he is under some legal disability: as in the case of lunacy, when, as has been already stated, it may be made by his committee.⁶ A *feme covert* may also, as we have seen, in certain cases, make an affidavit in support of a motion for a *ne exeat*, to restrain her husband from going abroad.⁷ The writ has been issued on the affidavit of an infant of the age of eighteen years.⁸

No rule is more strong than that the writ shall not issue without a positive affidavit; and that an affidavit as to information and belief only will not be sufficient.⁹ The affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt to hold to bail;¹⁰ and even where the affidavit is positive, yet, if it appears that, under the circumstances, the deponent could only have

¹ *Lloyd v. Cardy*, Prec. in Ch. 171.

² *Elliot v. Sinclair*, Jac. 545; and see *Collinson v. —*, 18 Ves. 353. The application may be made by petition: though in practice this is very rarely done. Where the suit is commenced by administration order the application may be made by motion.

³ *Elliot v. Sinclair*, *ubi sup.*

⁴ *Jackson v. Petrie*, 10 Ves. 164; *Dick v. Swinton*, 1 V. & B. 371.

⁵ In *Roddam v. Hetherington*, 5 Ves. 91, 96, Lord Rosslyn said, he did not recollect any instance where a *ne exeat* had been applied for upon admissions in the answer; but that the admission would certainly do as well as an affidavit.

⁶ *Ante*.

⁷ *Ibid.*

⁸ *Roddam v. Hetherington*, *ubi sup.*

⁹ *Ibid.*; *Darley v. Nicholson*, 1 Dr. & War. 66.

¹⁰ *Jackson v. Petrie*, *ubi sup.*; and see at Law, *Chitty's Arch.* 740.

acquired his knowledge from the information of others, it will be insufficient. Thus, where a *ne exeat* had been obtained on the affidavit of the plaintiff, who was an infant, it was discharged, although the affidavit was positive: because it appeared, from the statement in the bill, that the plaintiff, who was eighteen years of age, could only have known some of the facts deposed to from the information of others.¹

The only exception to the rule, that the affidavit must be positive, is, as we have seen, in the case of an account: in which the plaintiff may swear, that, to the best of his belief, such a sum will be due to him on the balance.²

It is also necessary that the evidence, on which the application for this writ is founded, should show that the defendant intends going abroad. It seems, formerly, to have been thought, that an affidavit was, in this respect, sufficient, if it merely stated a belief of the defendant's intention to quit the kingdom, without going into the circumstances upon which that belief was founded.³ But it is now held, that an affidavit, to obtain this writ, must be positive as to the defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it;⁴ and must show the means of knowledge of the deponent. In *Oldham v. Oldham*,⁵ the Court observed: "it is not sufficient to swear that another person said so;" but this must be understood with some qualification: for, in a subsequent case, where the affidavit was made, "not by the plaintiff, but another, to his belief of the defendant's intention to quit the kingdom, upon information received from two persons of his family that they were about to go to the Isle of Man," the writ was granted by Lord Eldon: who, after stating that the point had frequently embarrassed him, expressed himself thus: "But there are cases in which the Court appears to have regarded, and acted upon, the nature of the information and belief.

¹ *Roddam v. Hetherington*, 5 Ves. 91.

² *Ante*.

³ *Beames on Ne exeat*, 33; *Russell v. Asby*, 5 Ves. 96: see also *Chapeaurouge v. Carteaux*, 8 Ves. 597, n.

⁴ *Beames on Ne exeat*, 33; *Avern*, 2 Ves. 8. 439; *Oldham v. Oldham*, 7 Ves. 410; *Etches v. Lence*, *ib.* 417; *Amsinck v. Barklay*, 8 Ves. 597; *Hannay v. McEntire*, 11 Ves. 54; *Jones v. Alephrin*, 16 Ves. 470; see also *Taylor v. Leitch*, 1 Dick. 380; *Sherman v. Sherman*, 3 Bro. C. C. 370; *Hyde v. Whitfield*, 19 Ves. 342; *Staheli v. Raphael*, 4 L. T. N. S. 114, V. C. W. As to the evidence required at Law, see *Chitty's Arch.* 788.

⁵ 7 Ves. 410.

The information is, in this instance, given by persons of the defendant's family: who, therefore, could not be brought forward to make an affidavit; and the circumstance, that the party has not made the affidavit, has not been considered an objection." In *Knight v. Watts*,² Lord Hardwicke granted the writ upon an affidavit which, after stating the defendant had denied himself, and kept out of the way, and had sold off his goods, and left his house uninhabited, proceeded thus: "that the plaintiff, upon inquiry after the defendant, was informed, that one Mr. Bulcock acted as an agent for him; and that, thereupon, the plaintiff and his solicitor applied to the said Mr. Bulcock: who informed the plaintiff, that, unless he would take an assignment of two houses, (to which the defendant pretended he was entitled, if he arrived at the age of thirty,) and give the defendant a discharge for all the monies he had received, the defendant would immediately go abroad, and would either take with him the deeds, or would burn, or destroy the same."

The affidavit will be sufficient, if it states, that the debt will be endangered by the defendant's quitting the kingdom: without stating that the object is to avoid the jurisdiction.³

The order for the writ states the amount for which security is to be given, and before it will be made, the applicant is almost invariably required to give his undertaking to abide by any order the Court may make as to damages.⁴ Where the application is made on behalf of infants, the undertaking is given, by their next friend signing the Registrar's book.⁵

The affidavits in support of the application must not be sworn until the bill is filed;⁶ or before a commissioner who is a solicitor in the cause.⁷

¹ *Collinson v. —*, 18 Ves. 353; *Beames on Negligent*, 34.

² C. P. Coop. t. Cott. 257. The defendant had been appointed by the plaintiff to collect an intestate's estate, and had the deeds in his possession for that purpose: *ib.*; *Beames* 36.

³ *Baker v. Haily*, 2 Dick. 682; *Etches v. Lance*, 7 Ves. 417; *Tomlinson v. Harrison*, 8 Ves. 22; *Stewart v. Graham*, 19 Ves. 313; *Boehm v. Wood*, T. & R. 332; and see *Vanseller v. Vanseller*, 15 Jur. 115, V. C. K. B.

⁴ For form of order, see *Seton*, 959.

⁵ *Jones v. North*, cited *Seton*, 300.

⁶ *Anon.*, 6 Madd. 276; and see *Francome v. Francome*, 11 Jur. N. S. 123; 13 W. R. 355, L. C.

⁷ *Hopkin v. Hopkin*, 10 Hare, App. 27: 17 Jur. 343.

The writ of *ne exeat* is directed to the sheriff, or other officer of the county or jurisdiction in which the party against whom it is issued is likely to be found.¹ It is prepared by the solicitor of the party; and is sealed with the seal of the Record and Writ Clerks' office. The order for the writ must be produced, and a *præcipe* left, at the time the writ is presented for sealing.

The writ must be indorsed with the name and place of business of the solicitor for the party issuing it, and of his agent, if any; or with the name and place of residence of such party, where he acts in person, and, in either case, with the address for service, if any; and must be marked on the back, in words at length, with the amount of the sum for which the defendant is to give security. This is done as a guide to the Sheriff, to take sufficient security, by bail bond, for the defendant's yielding obedience thereto.³

Where the writ is issued against a personal representative, at the instance of a legatee, or person claiming a share of the residue, it must be marked for the whole amount due from the defendant: not to the plaintiff only, but to all the other persons interested in the estate;⁴ and it seems that the Court will sometimes extend the amount of the security required, beyond that of the debt sworn to, for the purpose of covering the costs of proceedings at Law.⁵ In *Boehm v. Wood*⁶ also, the writ was marked for the full amount of the purchase-money, though the defendant was entitled to an abatement: the amount of which, however, had not been ascertained.

Where the writ has been indorsed for a larger sum than is really due, there is no doubt that the Court will make an order that the security shall be given for so much only as is really due, without quashing the writ; and that, too, upon the hearing of a motion to quash it.⁷

¹ On this subject, see *ante*.

² *Beames on Ne exeat*, 98; and see form of order, *Seton*, 959, No. 1.

³ *Hinde*, 611.

⁴ *Pannell v. Tayler*, T. & R. 100. See *Boosey v. Sutcliffe*, 2 Eq. Rep. 706, V. C. W.

⁵ *Bonner v. Worthington*, Reg. Lib. 1819, A. 12, cited *Beames on Ne exeat*, 94.

⁶ T. & R. 332.

⁷ *Pannell v. Tayler*, *ubi sup.*

How executed.

To carry this process into effect, the writ must be delivered to the proper Sheriff, or other officer, with instructions for executing it. By the terms of the writ, the Sheriff is to cause the party personally, to come before him, and give sufficient bail or security in the sum indorsed on the writ, that he will not go, or attempt to go, into parts beyond the seas, without leave of the Court; and, on his refusal, he is to commit him to prison. It is said, that it is an abuse of this process to break open doors, and take the party in bed; however, where this had been done, the Court refused to set him at liberty.¹

When a caption is made, the defendant, to obtain his discharge out of custody, must execute a bond, conditioned as pointed out by Sec. 11 of the Arrest and Imprisonment for Debt Act.

As the Sheriff is directed by the writ, to cause the defendant to give sufficient bail or security, he is not bound to take any security but what he may be satisfied is likely to prove effective. Thus, where the writ was marked in the sum of 36,000*l.*, and the defendant, after he was taken into custody, tendered to the Sheriff, as a security, the bond of himself and two sureties, in the sum of 36,000*l.*, and a deposit of that sum in the Bank of England, in the joint names of the Sheriff and sureties, which the Sheriff refused to accept, and, although he afterwards proposed to release the defendant out of custody, upon his finding four sureties, in 36,000*l.* each, yet he ultimately insisted that the 36,000*l.* should be paid into his hands before the defendant was discharged, Lord Eldon held, that the Sheriff was right in the course he had pursued: for whatever the Sheriff does, under a writ of *ne exeat*, is upon his own responsibility; and what he had done, was merely to require a sufficient security for his having the defendant to produce.²

From this it appears that, instead of bail, the Sheriff may take a deposit of the amount indorsed upon the writ.³

¹ *Wyatt's Pr. R.* 290; *Curs. Canc.* 465. As to the mode of executing writs, *see ante*.

² *Bochin v. Wood*, T. & R. 332, 340.

³ *See Bonnar v. Worthington*, Reg. Lib. 1819, A. 223.

The Sheriff, after he has executed the writ, ought to return it: indorsing upon it a proper return of what he has done. If he has taken bail, it may be in the following form: "I have caused the within named A. B. personally to come before me, and he found bail in the penalty of £——, according to the command of this writ."¹ If, instead of taking security according to the direction of the writ, the Sheriff takes a deposit of the amount indorsed on the writ, he should make a return to that effect; and where the Sheriff omitted to do so, the Lord Chancellor ordered him to make his return within a given time.²

How discharged.

The party may apply by motion, with notice, to discharge the writ, on the ground of irregularity, or upon the merits, supported, if necessary, by evidence: which is usually given on affidavit.³ The defendant may also, by analogy, if he has not been interrogated, put in a voluntary answer: which he will be entitled to read in opposition to the plaintiff's affidavits.⁴ If security has been given, the notice of motion should state that application will be made, as well for the discharge of the writ, as that the bond may be given up to be cancelled.

If, upon an application to discharge or quash the writ on the ground of irregularity, the Court thinks that it has been improperly issued, it will at once order it to be discharged. It will not, however, discharge the writ, merely because it appears to have issued for a sum exceeding that for which it can be sustained; but, in such cases, the amount for which it has been marked will be reduced.⁵ Nor will the Court discharge a writ of this nature, obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to go abroad, upon a counter-affidavit by the defendant denying the intention.⁶ The Court has also refused to quash the writ, upon the defendant's

¹ *Impey*, Off. Sheriff, p. 411.

² *Bonner v. Worthington*, Reg. Lib. 1819, A. 223. As to compelling the Sheriff to return a writ, see *ante*.

³ *Grant v. Grant*, 3 Russ. 598, 602; and see *Hyde v. Whitfield*, 19 Ves. 242; *Flack v. Holm*, 1 J. & W. 405, 418; *Stahell v. Raphael*, 4 L. T. N. S. 114, V. C. W.; *Seton*, 960.

⁴ *Anderson v. Stamp*, 11 Jur. N. S. 160, V. C. W.

⁵ *Grant v. Grant*, 3 Russ. 598, 611.

⁶ *Whitehouse v. Partridge*, 3 Swanst. 365, 375; *Amsinck v. Bartley*, 8 Ves. 504, 507.

affidavit that no debt was due, and that the plaintiff had made admission to that effect: the plaintiff having, by his affidavit, sworn positively to there being a debt.¹

The Court will discharge the writ upon the merits, whenever it appears either that the plaintiff has no case, or that the defendant is not going out of the jurisdiction;² and this it will do either absolutely, or conditionally: that is, upon the defendant's giving security with two sureties to answer such sum as may be found due from him in the cause.³

The Court, in an alimony suit, on a motion to discharge the defendant from arrest under a writ of arrest, will look into the merits of the case so far as to enable it to judge whether the plaintiff has reasonable grounds to expect to succeed in her case; and in the absence of her showing such fair and reasonable grounds, or in the event of the defendant displacing the *prima facie* case made by her on obtaining the writ, he will be discharged. A writ of arrest had been granted on the affidavit of the plaintiff alleging violence and ill-treatment on the part of the defendant, and showing that the defendant had advertised his stock and farming implements for sale. A motion was made to set aside this writ, and the violence and ill-treatment were denied. The plaintiff was shown to be a young robust woman,—the defendant an old man of 68 years, and the conduct of the plaintiff to have been violent and very immoral and unchaste. On the denial of the defendant of any intention to leave the province, and under the circumstances above stated, the writ was ordered to be set aside.⁴

The Court will also discharge the writ, upon the defendant's paying into Court the sum for which the writ is marked.⁵

Where the writ is directed to issue, until answer and further order, the Court will not discharge the writ merely upon the coming in of the answer, if it appears, upon the merits of the case,

¹ *Jones v. Alephsin*, 16 Ves. 470.

² *Leo v. Lambert*, 3 Russ. 417; *Sichell v. Raphael*, 4 L. T. N. S. 114, V. C. W. For the order in the latter case, see *Seton*, 960.

³ *Roddam v. Hetherington*, 5 Ves. 91, 95; *Boon v. Collingwood*, 1 Dick. 115; *Atkinson v. Leonard*, 3 Bro. C. C. 218, 223. For form of such an order, see *Seton*, 969, No. 2.

⁴ *Macpherson v. Macpherson*, 2 Cham. Rep. 222.

⁵ *Evans v. Evans*, 1 Ves. J. 96; *Stewart v. Graham*, 19 Ves. 313, 314; *Dick v. Swinton*, 1 V. & B. 378.

that there will be necessarily decreed things for the defendant to do at the hearing.¹

It has also been decided, that a surety on a writ of *ne exeat* will not be discharged upon the principal being, by a subsequent process of the Court, committed to prison: as the surety is then in no danger.² Where the sureties applied to be discharged, on the ground that the defendant was in custody for want of an answer, Lord Eldon refused to discharge them: observing, that there was no instance of it; and that, on the contrary, there was a case in which the Court had refused to discharge them.³ These last-mentioned applications were previous to the decree; but where, after a decree against the defendant for the same matter as that for which the writ of *ne exeat* issued, the defendant, was in contempt, and in custody for not performing the decree, an order was made, on the application of the sureties, that they should be discharged, and the bond as to them cancelled.⁴

If the defendant pays to the plaintiff the sum for which the defendant, has given security on a writ of *ne exeat*, the writ and security will be discharged, as to the principal as well as sureties, notwithstanding that it may appear from the proceedings in the cause that a much larger sum is due from the defendant to the plaintiff.⁵ Where, subsequently to the issue of the writ against a defendant, he took the benefit of the Insolvent Debtor's Acts, the writ was discharged upon his paying the costs of the application to discharge the writ, and relieving the plaintiff from all liability on his undertaking as to damages, and from any action or other proceeding with respect to the writ.⁶

When an application to discharge the writ is granted, the discharging order ought also to restrain the person against whom the writ has issued from bringing an action for false imprisonment:

1 *Atkinson v. Bedel*, 1 Dick. 98.

2 *Le Clea v. Trot*, Prec. in Ch. 230. "A ball in this Court, or in the Civil Law, is not discharged upon bringing in the principal, as he is at Common Law: *Archepoole contra Burrell*, Michas. 23 & 24 Eliz.": MS. of Sir Geo. Carey, cited *Beames on Ne exeat*, 84, n. (14). Tothill's note of *Archboll v. Barrell*, which seems to be the same case, is, however, simply in these words: "A ball in this Court, or in the Civil Law, is discharged upon bringing in the principal, as he may at the Common Law": Tothill, 17; and see *Griffith v. Griffith* 2 Ves. S. 400.

3 *Stapylton v. Peill*, 19 Ves. 615; cited *Beames on Ne exeat*, 84.

4 *Debazin v. Debazin*, 1 Dick. 95; Reg. Lib. 1743, A. 64.

5 *Baker v. Jeffries*, 2 Cox. 226; *Beames on Ne exeat*, 86.

6 *James v. North*, 5 Jur. N. S. 84; 7 W. R. 150, V. C. K.

otherwise, in the event of such an action being brought, although probably in all cases the Court would stop the action, yet the costs of the application for that purpose would be at the expense of the person by whom the writ had been obtained.¹

Where the usual undertaking as to damages has been given, the Court will, if it considers that the writ has been improperly obtained, direct an inquiry as to the damages sustained by the defendant, and order payment of the amount certified in respect thereof.²

The Court will not, after the writ has been discharged in Equity, interfere to direct the party to be discharged from a subsequent arrest at Law for the same demand; but will leave it to the Court of Law to determine whether, under the circumstances, the Common Law process ought to be made available.³

A writ of *ne exeat* will not be discharged on the mere ground that, since it was ordered, the plaintiff has amended his bill: unless it can be shown that the amendments have varied the case, as originally stated. The Court, therefore, will not make a special order, giving the plaintiff liberty to amend, "without prejudice to the *ne exeat*;" but will leave it to him to obtain the common order, if he thinks he can do so with safety.⁴

¹ *Darley v. Nicholson*, 2 Dr. & War 86.

² *Sichell v. Raphael*, 4 L. T. N. S. 114, V. C. W. For the order in that case, see *Seton*, 960, No. 1. As to the prosecution of the inquiry at Chambers, see *ante*.

³ *Walker v. Christian*, 7 Sim. 367.

⁴ *Grant v. Grant*, 5 Russ. 189.

CHAPTER XL.

RECEIVERS.

In what Cases appointed.

A Receiver is an indifferent person, between the parties appointed by the Court to receive the rents and profits of real estate, or to get in and collect personal estate, or other things in question, pending the suit, where it does not seem reasonable to the Court that either party should do it ; or where a party is incompetent to do so : as in the case of an infant. A Receiver is bound to account for and pay what he receives or gets in, as the Court shall direct ; and, to secure his doing so, he is commonly ordered to enter into a recognisance, with sureties.¹

The appointment of a receiver is a matter resting in the discretion of the Court ;² and the receiver, when appointed, is treated as virtually an officer and representative of the Court, and subject to its orders.³ Lord Hardwicke considered this power of appointment to be of great importance, and of most beneficial tendency : saying, " It is a discretionary power exercised by this Court, with as great utility to the subject, as any sort of authority that belongs to it ; and is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled ; and does not at all affect the right."⁴

The defendant cannot defeat a motion for a receiver by a general affidavit that he has a good defence to the suit ; he must specify the defence distinctly to enable the plaintiff to meet it, and the Court to judge of it.⁵

1 Ord. 278 to 283 ; *Wyatt's Pr. R.* 355, 356 ; *Harr. by Newl.* 499. As to Receivers, see *Adams on Eq.* 447 ; *Chambers on Infants*, 547—564 ; *Fisher*, 227—290 ; *Jeremy on Eq.* 248—253 ; *Levin on Trusts* ; 666—682, *Macpherson on Infants*, 266—268 ; *Seton*, 1002—1639 ; *Story Eq. Jur. ss.* 827—838 ; *Woodfall*, 51.

2 *Skip v. Harwood*, 3 Atk. 564 ; and see *Owen v. Homan*, 3 M'N. & G. 378, 412 : 15 Jur. 339 ; 4 H. L. Ca. 997 : 17 Jur. 861.

3 *Angel v. Smith*, 9 Ves. 335 ; *Hutchinson v. Massarene*, 2 Ball & B. 55 ; *Jeremy on Eq.* 248, 249.

4 *Skip v. Harwood*, *ubi sup.* ; and see *Story Eq. Jur. s.* 831.

5 *Atkins v. Blain*, 13 Grant 646.

The most ordinary cases in which receivers are granted by the Court, are those in which the suit arises out of claims by parties having equitable interests in the property, the subject of litigation. In such cases, the Court will appoint a receiver, for the purpose of protecting the property, till the question between the parties shall have been determined. And, in general, it may be taken as a rule, that where the legal estate is vested in a person claiming an interest paramount to that of the litigant parties, so that the litigant parties can only have equitable interests, the Court will grant a receiver: although, in doing so, it will always take care not to interfere with the rights of the party having the prior estate. Therefore, where a man has an equitable mortgage, "that is, if there is a prior mortgagee: then, if the prior mortgagee is not in possession, the other may have a receiver, without prejudice to his taking possession."¹ In *Berney v. Sewell*,² Lord Eldon said; "I remember a case, where it was much discussed whether the Court would appoint a receiver, when it appeared by the bill that there was a prior mortgagee who was not in possession. I have a note of that case: there, Lord Thurlow made the appointment, without prejudice to the first mortgagee's taking possession, and that was afterwards followed by Lord Kenyon."³

An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principal before the bankruptcy of the latter, on which, however, he had paid nothing, and he disputed any liability to holders in respect thereof: *Held*, that the assignee in bankruptcy was entitled to a receiver.

In such a case the defendant set up a defence founded upon a verbal agreement proved by his own affidavit only, and inconsistent with a written instrument which purported to contain the agreement entered into between the parties: such agreement having been drawn by the defendant himself, a practicing attorney and

¹ Per Lord Eldon, 1 J. & W. 648.

² 1 J. & W. 647.

³ *Ibid.* 649. In *Phipps v. Bishop of Bath and Wells*, as reported in 2 Dick 608, Lord Thurlow refused the appointment of a Receiver at the instance of a second mortgagee: the first not being in possession: but in *Bryan v. Cornick*, 1 Cox, 422, he came to the determination mentioned in the text. A similar order was also made in *Dalmer v. Dashwood*, 2 Cox, 378. In *Norcross v. Rose*, 19 Ves. 144, 153, Lord Eldon states it to be the practice, on motions for Receivers, not to look at mortgages further than to take care that they are not prejudiced: see *Price v. Williams*, G. Coop. 31; *Brooks v. Greathed*, 1 J. & W. 176.

solicitor, and executed by all parties : *Held*, that the defence ought not to prevail on a motion for a receiver. In this case a receiver was granted with liberty to the defendant to propose himself as such without salary.¹ This Court has jurisdiction, and will exercise it to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in this Court. Where, therefore, a purchaser at sheriff's sale of the interest of one partner filed his bill for an account and a receiver, and the receiver obtained possession of the stock in trade : leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency, when he should be appointed.²

The same principle is applied to other equitable creditors;³ and, indeed, to all other persons having mere equitable estates. The rule, with respect to equitable creditors, is thus laid down by Lord Eldon, in *Davis v. The Duke of Marlborough*:⁴ "The rule I take to be that the Court will, on motion, appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates : in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession, if they think proper ;⁵ and with regard to persons having prior equitable estates, the Court takes care, in appointing a receiver, not to disturb equities ; and, for that purpose, directs inquiries, to determine priorities among equitable incumbrancers : permitting legal creditors to act against the estates at Law, and settling the priorities of equitable creditors. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill will be given when a decree is pronounced, the Court will not expose parties claiming that relief to the danger of losing the rents, by not appointing a receiver of an estate on which it is admitted that they cannot enter."⁶ And here it may be remarked, that although, where there is a prior mortgagee in existence having the

¹ *Kemp v. Jones*, 12 Grant, 280.

² *Felan v. McGill*, 3 Cham. Rep. 68.

³ See *Curling v. Marquis Townsend*, 19 Ves. 428.

⁴ 2 Swanst, 137.

⁵ See *Dalmer v. Dashwood*, 2 Cox, 378, 382 ; but they must first obtain leave of the Court : *Bryan v. Cormick*, *ubi sup.* ; *Anon.* 6 Ves. 237 ; *Angel v. Smith*, 9 Ves. 335 ; *Brooks v. Greathed*, 1 T. & W. 176 ; *Greasley v. Adderley*, 1 Swanst, 579 ; *Rhodes v. Lord Mostyn*, 17 Jur. 1007, V. C. W. ; and see *post*.

⁶ The granting, however, of a Receiver is a matter of discretion, to be governed by the whole circumstances of the case : one most material of such circumstances being, the probability of the plaintiff being ultimately entitled to a decree : *Owen v. Homan*, 3 M. & G. 378, 412 ; 15 Jur. 339, 346 ; Aff. 4 H. L. Ca. 997 ; 16 Jur. 361 ; and see *Compey v. Crookwell*, 12 W. R. 393, V. C. K.

legal estate, the Court will not, by the appointment of a receiver, deprive him of his right to possession, it will not permit him to object to the appointment of a receiver by any act short of a personal assertion of his legal right, and taking possession himself.¹ And if, after a receiver has been appointed, he does not think proper to avail himself of his legal right (which he may do by applying to be examined *pro interesse suo*), he will not be permitted to have the benefit of the receiver:² the appointment of a receiver being for the benefit of incumbrancers, so far, only, as expressed to be for their benefit, and as they choose to avail themselves of it.³

The Court will grant a receiver at the instance of a second incumbrancer, in all cases in which the first incumbrancer is not in possession of the property; and the circumstance of the party creating the incumbrance being abroad, and refusing to appear to the suit, will not deprive the second incumbrancer of his right to a receiver. In *Holmes v. Bell*,⁵ however, Lord Langdale, M.R., appears to have entertained some doubt as to his power to appoint a receiver, where one of two mortgagors, who were tenants in common, was abroad: at least so far as regarded the moiety of the absent party: although he thought the objection removed, by the circumstance of the mortgagor, who was in England, being in the possession of the whole rents. His Lordship's difficulty appears to have arisen from *Browne v. Blount*,⁶ in which Sir John Leach, M.R., refused to appoint a receiver, in the absence of the owner of the estate. The decision in that case, however, was not come to upon an interlocutory application, but upon the hearing of the cause: on which occasion, it having been held that the Court could not proceed to make a decree in the absence of the party beneficially interested, it was urged that, although it could not grant the relief prayed, it would go the length of appointing a receiver. It appears now to be settled that a receiver may be granted against a defendant who is out of the jurisdiction of the Court;⁷ and where the defendant has absconded to avoid service.⁸

1 *Silver v. Bishop of Norwich*, 3 Swanst. 112, n. (b); *Rhodes v. Lord Mostyn*, 17 Jur. 1007, V. C. W.
2 See *Anon.* 6 Ves. 287; *Angel v. Smith*, 9 Ves. 335, 338; *Brooks v. Greathed*, 1 J. & W. 178; *Hunt v. Priest*, 2 Dick. 540

3 *Gresley v. Adderley*, 1 Swanst. 579.

4 *Tanfield v. Irvine*, 2 Russ. 140; but see *Coward v. Chadwick*, *ib.* 150, n.

5 2 Beav. 298. 6 2 R. & M. 83.

7 *Gibbins v. Mainwaring*, 9 Sim. 77; *Smith v. Smith*, 10 Hare, App. 71; and see *Stratton v. Davison*, 1 R. & M. 484.

8 *Pritcher v. Helliar*, 2 Dick. 580; *Maguire v. Allen*, 1 B. & R. 75; *Dowling v. Hudson*, 14 Beav. 421.

The Court will not, unless under very particular circumstances, appoint a receiver, where the party having the legal estate is in actual possession of the property.¹ Thus, although a second mortgagee may have a receiver, where the first is not in possession, yet, if the first mortgagee is in actual possession of the estate, a receiver will not be appointed: unless it is shown that the first mortgagee has been paid off: in which case, a receiver may be appointed, on the application of a subsequent incumbrancer.²

In order to defeat an equitable mortgagee of his right to a receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits: a mere possession as tenant will not be sufficient; and where one of the defendants was in the occupation of part of the estate as tenant, and had purchased of the plaintiff a part of his mortgage, the interest of which was about equal to the rent of his occupation, the Court of Exchequer held, that he could not unite his two characters of mortgagee and tenant; and that his possession, being as tenant, could not be set up against the other mortgagee.³

And here it may be remarked, that as between mortgagees in possession and persons having subsequent interests, the Court will not appoint a receiver against a mortgagee's own oath that something is due to him,⁴ unless the party making the application will offer to pay him off, according to his demand, as he states it himself: in which case, if the party will bring the mortgagee's own confession that he has been paid off, or that he has refused to accept what is due to him, the receiver will be appointed;⁵ but, for this purpose the Court will require the mortgagee to state upon his oath what he believes to be due; and, in taking the possession from him upon payment of what he swears to be due, it will make him give secu-

1 It seems that this rule will not apply, where the party in possession is merely so upon execution, under a judgment; and that, in such cases, a creditor having taken out execution, cannot hold property against an estate created prior to his debt. Upon this principle, Lord Eldon made an order for the appointment of a Receiver of the rents and profits of a rectory, at the instance of a second incumbrancer: although a third incumbrancer was in possession, under a sequestration from the Bishop, which his Lordship considered, in contemplation of this Court, as equal to a judgment: *White v. Bishop of Peterborough*, 3 Swanst. 109, 116, 117; but see *Bates v. Brothers*, 2 Sm. & G. 509. As between equitable creditors and judgment creditors, having possession under writs of *elegit*, it is competent to the Court to appoint a Receiver in favour of the equitable creditors, not disturbing the rights of any judgment creditors in possession: *Davis v. Duke of Marlborough*, 1 Swanst. 74, 84.

2 See *Quarrell v. Beckford*, 13 Ves. 377; *Codrington v. Parker*, 16 Ves. 469; *Berney v. Sewell*, 1 J. & W. 647.

3 *Archdeacon v. Bowes*, 3 Anst 752.

4 *Rowe v. Wood*, 2 J. & W. 553, 557.

5 *Berney v. Sewell*, 1 J. & W. 647.

erty to refund, if it shall appear, upon the account, that so much is not due; and where he will not swear that anything is due the Court will appoint a receiver.¹

The disinclination of the Court to appoint a receiver, where the property is in possession of a party having the legal estate, is felt in those cases only in which the estate of the party in possession is prior to that of the parties to the litigation. Where the right to the possession is the subject of dispute, and the plaintiff having an equitable interest claims the legal estate from the defendant in possession, the Court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favour, appoint a Receiver pending the suit.² Thus, a Receiver may be appointed at the instance of a purchaser *pendente lite*, if the Court is satisfied that the contract is one which it can enforce.³ So, also, where the defendant, on an advance of money by the plaintiff, agreed to execute a mortgage of certain lands, but did not perform the agreement, and there was an arrear of interest due on the money advanced, upon which the plaintiff filed a bill for specific performance, a Receiver was appointed.⁴ In like manner, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to pay it after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and a covenant to levy a fine and suffer a recovery to give effect to the mortgage, but, on coming into possession of the estate, refused to perform his covenant, the Court appointed a receiver of the rents.⁵

Upon the same principle, where a bill was filed by creditors, claiming satisfaction out of real and personal assets, and it appeared, by the answer of the person in possession of the real estate, that the real estate must eventually be responsible, as there was no personal estate to be applied to discharge debts, the Court appointed a receiver in the first instance.⁶

1 *Chambers v. Goldwin*, cited 13 Ves. 377; *Quarrell v. Beckford*, *ib.*

2 See *Whitworth v. Gaugain*, 1 Phil. 728; 3 Hare, 418.

3 *Metcalf v. Pulvertoft*, 1 V. & B. 180; and see *Dawson v. Yates*, 1 Beav. 301; 2 Jur. 900.

4 *Shakel v. Duke of Marlborough*, 4 Madd. 463.

5 *Free v. Hinde*, 2 Sim. 7.

6 *Jones v. Pugh*, 8 Ves. 71; *Earl of Fingal v. Blake*, 2 Moll. 50; *Chalk v. Raine*, 7 Hare, 393; 13 Jur. 981; and see *Coope v. Creswell*, 12 W. R. 299, V. C. K.

The Court, sometimes, will appoint a receiver against a party having possession under a legal title. Thus, where fraud can be clearly proved, and immediate danger is likely to result if the intermediate possession should not be taken under the care of the Court, a receiver will be appointed.¹ This rule was recognised by Lord Eldon in *Lloyd v. Passingham*:² where his Lordship observed: "The Court interposes, by appointing a receiver, against the legal title, with reluctance: compelled by judicial necessity, the effect of fraud clearly proved, and the imminent danger if the intermediate possession should not be taken under the care of the Court." In order, however, to induce the Court thus to interfere, it is, according to his Lordship's subsequent remarks, not only necessary that the Court should be satisfied of the existence of fraud, but it must be morally sure that, upon the hearing of the cause, the party would, upon the circumstances, be turned out of possession; and not only that, but it must see some danger to the intermediate rents and profits.³ His Lordship, in that case, did not conceive that the circumstances disclosed formed that extreme case in which the possession was to be taken from those who had the legal right; but, in a later case of *Stilwell v Wilkins*,⁴ where a bill was filed for the purpose of setting aside a purchase, and the answer of the defendants, who were the devisees of the purchaser, admitted the great inadequacy of the price but stated their ignorance of the other circumstances of fraud alleged, his Lordship granted the receiver; because, if the case stated was true, the inadequacy was so monstrous, and the situation of the young man and the state of his intellect were such that it was hardly possible to suppose that the transaction could stand. He thought, therefore, that it was a case in which such an order might be made: though it was not the general habit of the Court.

Upon the same principle, the Court interfered in *Podmore v. Gunning*.⁵ In that case, a testator, by his will, bequeathed the residue of his real and personal estate to his wife, "having

¹ *Lloyd v. Passingham*, 16 Ves. 59; *Hugonin v. Baseley*, 13 Ves. 105.

² 16 Ves. 70.

³ *Lloyd v. Passingham*, 16 Ves. 59, 70, and see *Hugonin v. Baseley*, *ubi sup.*

⁴ Jac. 380, 383; S. C. nom. *Stitwell v. Williams*, 6 Madd. 49.

⁵ 5 Sim. 485; see also *Landon v. Morris*, 5 Sim. 247.

perfect confidence that she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease ;" and, upon the wife's dying without a will, the Court appointed a receiver, upon an allegation in the bill (supported by affidavit), of a promise by the wife to her husband, on the faith of which he had made his will, that she would bequeath the residue of his property, after her decease, to the plaintiffs, who were his natural children.

In the above cases, there were circumstances of either actual or constructive fraud, as well as of actual title, to induce the Court to interfere. Where these circumstances are absent, and there is no case of spoliation, the Court will not appoint a receiver upon mere ground of title in the plaintiff.¹

Although the Court will not interfere upon the mere ground of title, it will appoint a receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken.² Thus, in the case of executors, if the executor has wasted the effects, or in other respects misconducted himself, the Court will interfere, by the appointment of a receiver.³ Upon this ground, also, where an executor has not done what he can to get in the personal estate,⁴ or is out of the jurisdiction,⁵ the Court will order a receiver to be appointed.

Although a receiver will be appointed as against an executor, where it is shown that there is a probability of danger to the property, it must be such danger as arises from the misconduct or neglect of the party : mere poverty will not, of itself, constitute a sufficient ground for such an appointment.⁶ Where, however an executrix, who had been appointed guardian, by her husband

1 *Clark v. Det.* 1 R. & M. 103; *Tolderoy v. Coll.* 1 Y. & C. Ex. 621; *Middleton v. Sherburne*, 4 M. 368; *Lancashire v. Lancashire*, 9 Beav. 120; 9 Jur. 966; *Earl Talbot v. Hope Scott* (No. 1), 4 K. & J. 96; 4 Jur. N. S. 1172.

2 *Barkley v. Lord Reay*, 2 Hare, 308; *Bainbrigg v. Baddeley*, 18 Beav. 355; 3 M. & G. 413. A Receiver may be appointed, in such a case, although there is no personal representative; *Steer v. Steer*, 13 W. R. 225, V. C. K.; *Oversington v. Ward*, 34 Beav. 175.

3 *Anon.* 12 Ves. 4; *Middleton v. Dodswell*, 13 Ves. 206; *Havers v. Havers*, Barnard 22; *Lord v. Purchas*, 17 Beav. 171, 178; *Hervey v. Fitzpatrick*, Kay, 421.

4 *Richards v. Perkins*, 3 Y. & C. Ex. 290, 307; 3 Jur. 168.

5 *Smith v. Smith*, 10 Hare, App. 71.

6 *Hathornthwaite v. Russell*, 2 Atk. 126; *Anon.* 12 Ves. 4; *Howard v. Papera*, 1 Madd. 42; *Manners v. Furze*, 11 Beav. 30, 31.

of her three children, married a second husband in necessitous circumstances, the House of Lords directed a receiver to be appointed to get in the outstanding personal estate.¹ And where the husband of an executrix, was in the West Indies, and was sworn to be in indifferent circumstances, a receiver was appointed.² It appears, however, from the report of that case, as if a principal ground for granting the receiver had been the fact of the husband being in the West Indies, and not amenable to the process of the Court; but, in another case of a similar nature, the order was made upon the proof of the husband's insolvency: though the affidavit positively denied the fact of his being abroad.³ It seems, also, that a receiver will be appointed if the husband of the executrix is of unsound mind.⁴ And, in general, where a personal representative is insolvent, a receiver will be appointed; and if it should be necessary to bring actions at law to recover part of the effects, since that must be in the name of the executor, the Court will compel him to allow his name to be used.⁵ It seems, however, that if a person, known by a testator to be a bankrupt or to be insolvent, is appointed an executor by his will, such person will not, in general, be controlled by the appointment of a receiver;⁶ but it is not to be inferred from the circumstances of the will having been made some time before the bankruptcy, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor.⁷ The circumstance, that the party who had the administration of the testator's effects was an uncertificated bankrupt, and was not appointed to the office by the testator, has been held not to be a sufficient ground for the appointment of a receiver, where several of the parties interested had refused to join in the application.⁸

The same grounds which will induce the Court to take away from an executor the possession, or the right to the possession, of the testator's property, by the appointment of a receiver, in case

1 *Dillon v. Lady Mount Cashell*, 4 Bro. P. C. ed. Toml. 306, 312.

2 *Taylor v. Allen*, 2 Atk. 213.

3 *Scott v. Becher*, 4 Pri. 340.

4 *Yetta v. Palmer*, 9 Jur. N. S. 954, M. R.

5 *Utterson v. Mair*, 2 Ves. J. 96, 98; 4 Bro. C. C. 289, 277; *Scott v. Becher*, *ubi sup.*

6 *Stainton v. Carron Company*, 18 Beav. 146, 161; 18 Jur. 137.

7 *Gladdon v. Stomeman*, 1 Madd. 143, n.; *Langley v. Hawk*, 5 Madd. 46; *Williams on Exors.* 206.

8 *Smith v. Smith*, 2 Y. & C. Ex. 363.

of his misconduct or of his bankruptcy or insolvency, will induce the Court to interfere, in the case of any party clothed with the character of a trustee: whether he is a mere trustee, or a trustee having an interest in the estate or fund. Thus, where a trustee refuses to act, the Court will, on the application of the person beneficially interested, appoint a receiver;¹ and where several trustees under a settlement in consequence of disputes amongst themselves, permitted the rents of the trust estate to fall in arrear, the Court not only appointed a receiver to collect the rents, but ordered the costs of the suit to be paid by the trustees.² So, also, a receiver was appointed, where, in consequence of disagreement among the trustees, two out of three trustees acted without the third, and took the trust property in their names only;³ where the trustees accepted new trusts, which conflicted with the former trusts on which they held the property;⁴ and where, by the *laches* of the trustee, infant *cestuis que trust* were deprived of maintenance.⁵

Under very special circumstances, the appointment of a receiver has been ordered, in the absence of the trustee.⁶ Where, also, the trust property has been applied, without complaint, for a series of years, according to an uniform course of management, which has been sanctioned by the parties beneficially interested the Court will not appoint a receiver, by interlocutory order, on the ground that such application of property is a breach of trust: unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights and interests of an owner. Upon this ground, a motion for the appointment of a receiver of the estates vested in the Irish Society, at the instance of one of the London Companies, who claimed a beneficial interest in the income of the estates, was refused.⁷

In cases of misconduct by trustees, the Court will appoint a receiver: as well where the trust arises by implication, as where

1 *Palmer v. Wright*, 10 Beav. 234; and see *Brodie v. Barry*, 3 Mer. 695.

2 *Wilson v. Wilson*, 2 Keen, 249.

3 *Swale v. Swale*, 22 Beav. 584; see also *Tait v. Jenkins*, 1 Y. & C. C. 492; *Brawell v. Reed*, 1 Hare 434: 6 Jur. 530.

4 *Earl Talbot v. Hope Scott* (No. 2), 4 K. & J. 139: 4 Jur. N. S. 1172, 1180.

5 *Richards v. Perkins*, 3 Y. & C. Ex. 299, 307: 3 Jur. 168.

6 *Hughes v. Wheeler*, 11 Beav. 178, 179.

7 *Skinners' Company v. Irish Society*, 1 M. & C. 162; and see *Gray v. Chaplin*, 2 Russ. 126.

it is expressed. Upon this principle, the Court has held, that where a man takes a conveyance of a legal estate subject to equitable interests, he must satisfy those interests or submit to a receiver: therefore, where a man purchased lands subject to two equitable annuities, which he refused to pay, Lord Eldon expressed his determination to appoint a receiver, unless the defendant would enter into an undertaking to pay the annuities.¹

Upon the same principle, if a tenant for life of leaseholds is bound to renew, he is, in such cases, clothed with the character of trustee: and if, by his threats or acts, he manifests an intention to suffer the lease to expire, the Court will appoint a receiver, in order to provide a fund for renewal.² A similar order for the appointment of a receiver of the rents and profits of an estate, for the purpose of accumulating a fund, was made where the tenant for life had fraudulently obtained a sum of stock, to which the trustees of her settlement were entitled.³

As the object of appointing a receiver is, usually, the preservation and protection of the property in dispute pending litigation, the Court will not appoint a receiver on the application of a party who possesses the power of protecting the property without it: consequently, a receiver will not be appointed on behalf of a mortgagee who has the legal estate, as he has nothing to do but to take possession.⁴ So, also, where one of the plaintiffs was a trustee of the estate, with a power of entry and distress, Lord Eldon discharged an order appointing a receiver.⁵

Wherever there is a dispute respecting an estate, which depends upon a mere legal title, the Court will not, in general, grant a receiver: because the plaintiff has his remedy by asserting his title in a Court of Law.⁶ Thus, where an heir at law disputes a will against the devisees in possession, the Court will refuse a receiver: because he may, if he is entitled as heir, bring his ejectment against the devisees.⁷ This rule, however, is departed

¹ *Pritchard v. Fleetwood*, 1 Mer. 54.

³ *Woodyatt v. Gresley*, 8 Sim. 180.

⁴ *Berney v. Sewell*, 1 J. & W. 647; *Stursh v. Young*, 5 Beav. 557.

⁵ *Buzton v. Monkhouse*, G. Coop. 41.

⁶ See *Mordaunt v. Hooper*, Amb. 311.
⁷ *Knight v. Duplessis*, 1 Ves. S. 325; *Earl of Fingal v. Blake*, 1 Moll. 158; 2 Moll. 50; see also *Lloyd v. Trimleston*, ib. 81; *Bosner v. Bradshaw*, 4 Jur. N. S. 1011; 5 Jur. N. S. 80, V. C. S.; see also *Wright v. Wilkin*, 7 W. R. 337, V. C. K.; *Yetta v. Palmer*, 9 Jur. N. S. 964, M. R.

² See *Bennett v. Colley*, 2 M. & K. 225, 233.

from where there are peculiar circumstances in the case : as where the Court sees that it is clear, from the evidence produced, that it is important that the Court should interfere, for the protection of the estate or of the rents and profits. But a strong case of danger to the property, and a strong ground of title in the plaintiff, must be made out.¹

A receiver will also be appointed, at the instance of a person who has the legal estate, where the property is in the nature of a trade;² or where, from conflicting legal rights, it is impossible to obtain tenants for the property.³

The Court will likewise extend the application of the principle, of providing for the safety of property pending litigation, to cases where the litigation is in another Court. Thus, during litigation in the Court of Probate, a Court of Equity will entertain a bill for the mere preservation of the property of the deceased; and, if necessary, to take it out of the possession of the person claiming to be the executor, till the litigation is determined, and appoint a receiver; although the Court of Probate by granting an administration *pendente lite*, might provide for the collection of the effects;⁴ and a receiver may be appointed, as well where the litigation in the Court of Probate is to recall administration of probate already granted, as in a case where no administration has been granted before the application to the Court of Chancery;⁵ but the mere circumstance that there has been a suit instituted in the Court of Probate to recall a probate already granted, does not give the Court of Chancery jurisdiction to interfere: for if that were so, it is evident that, in order to obtain a receiver, it would be only necessary to institute a suit in the Court of Probate.⁶ The Court of Chancery, therefore, will

1 *Mordaunt v. Hooper*, Amb. 311; *Clark v. Dew*, 1 R. & M. 103, 109; *Tolderrey v. Coll*, 1 Y. & C. Ex. 621; *Middleton v. Sherburne*, 4 ib. 358; *Lancashire v. Lancashire*, 9 Beav. 120; 9 Jur. 956; *Bainbridge v. Baddeley*, 13 Beav. 355; 3 M'N. & G. 413; *Earl Talbot v. Hope Scott* (No. 2), 4 K. & J. 96; 4 Jur. N. S. 1172; *Wright v. Wilkin*, 7 W. R. 387, V. C. K.; see also *Yettis v. Palmer*, 9 Jur. N. S. 954, M. R.; and *Acland v. Gravenor*, 1 N. B. 119, M. R.

2 *Frapp v. Chard Railway Company*, 11 Hare, 241; 17 Jur. 887; and see *Story v. Lord Windesor*, 2 Atk. 630.

3 *White v. Smale*, 22 Beav. 72.

4 *Ld. Red. 135, 136*; *King v. King*, 6 Ves. 172; *Richards v. Chave*, 12 Ves. 462; *Edmunds v. Bird*, V. & B. 542; *Atkinson v. Henshaw*, 2 V. & B. 85; *Ball v. Oliver*, ib. 96; *Watkins v. Brent*, 1 M. & C. 97, 102; *Wood v. Hitchings*, 2 Beav. 2; 9 Jur. 858; *Jones v. Goodrich*, 10 Sim. 371; *Rendall v. Rendall*, 1 Hare, 152; *Anderson v. Guichard*, 9 Hare, 275; *Whitworth v. Whitson*, 2 M'N. & G. 52; 14 Jur. 142; *Williams v. Attorney-General*, Seton, 1003.

5 *Rutherford v. Douglas*, 1 S. & S. 111, n.; *Ball v. Oliver*, and *Rendall v. Rendall*, *ubi sup.*

6 *Watkins v. Brent*, *ubi sup.*; and see *Marr v. Littlewood*, 2 M. & C. 454; *Dew v. Clark*, 1 S. & S. 114; *Connor v. Connor*, 15 Sim. 598; 11 Jur. 662, n.; *Newton v. Ricketts*, 10 Beav. 525; 11 Jur. 662.

look into the case, to see whether, on the whole, such a case is made as justifies its interference; and it seems, that if it appears, from all the circumstances, that there is substantially a *lis pendens* in the Court of Probate, a receiver may be appointed: notwithstanding there is no ground laid for the interference of the Court in respect of any improper conduct of the parties.¹ The Court may also grant a receiver, pending an appeal from a decision of the Court of Probate.²

A Receiver may also be granted, pending litigation in a foreign Court.³

The Court will refuse to interfere against a joint-tenant or tenant in common in possession, at the suit of another joint-tenant or tenant in common: unless the defendant, being in possession receives the whole rent, and excludes his companion from the share due to him.⁴ It seems, however, that, in the absence of exclusion, a receiver of the applicant's share of the rents and profits may be appointed.⁵ A similar rule is acted upon where the applicant is an equitable joint-tenant or tenant in common; and in that case, in the absence of exclusion, a receiver of only the applicant's share will be granted.⁶

Where the property is in the nature of a trade, a receiver of the whole may be ordered: although the person applying has a legal interest in it. Thus, a receiver will be appointed of the tolls of a canal company, at the instance of a mortgagee;⁷ and of a mine, at the instance of one of several persons who are working it together.⁸

In case of partnership, the Court frequently appoints a receiver of the partnership estate; but it seems that the Court will not, in general, appoint a receiver of partnership effects, unless the plaintiff

1 *Williams* on Exors. 436; *Watkins v. Brent*, 1 M. & C. 97, 102; and see *Jones v. Brent* 3 Mad. 1; Affd. on appeal, Jac. 406.

2 *Liddell v. Liddell*, cited 12 Ves. 464; *Blake v. Blake*, 2 Beav. 293, n. (e); *Day v. Croft*, 2 Beav. 10, n. (d); *Wood v. Hitchings*, *ib.* 289; Affd. *ib.* 293, n. (a).

3 *Transatlantic Company v. Pietroni*, Johns. 604.

4 *Street v. Anderton*, 4 Bro. C. C. 313; see *Milbank v. Revett*, 2 Mer. 405; *Holmes v. Bell*, 2 Beav. 298; *Hargrave v. Hargrave*, 9 Beav. 849; *Scurrah v. Scurrah*, 14 Jur. 874, M. R.; *Sandford v. Ballard*, 33 Beav. 401; 10 Jur. N. S. 251, M. R.; see S. C. 30 Beav. 109; 7 Jur. N. S. 651; *Seton*, 1003; and see *contra*, *Willoughby v. Willoughby*, cited 2 Dick. 478; *Tyson v. Fairclough*, 2 S. & S. 142, 144.

5 *Calvert v. Adams*, 2 Dick. 478; *Fall v. Elkins*, 9 W. R. 861, M. R.

6 *Sandford v. Ballard*, *ubi sup.*; and see *Street v. Anderton*, *ubi sup.*

7 *Fripp v. Chard Railway Company*, 11 Haro. 241; 17 Jur. 887; and for the order, see *Seton*, 1034.

8 *Jeffrey v. Smith*, 1 J. & W. 298; *Story v. Lord Windsor*, 2 Atk. 630; *Lees v. Jones*, 3 Jur. N. S. 254, V. C. W.; and see *Norway v. Rowe*, 19 Ves. 144; *Roberts v. Eberhardt*, Kay, 148, 156, 159.

9 For forms of orders, see *Seton*, 1030, *et seq.*

appears to be entitled to a dissolution.¹ If the Court can see that a dissolution must take place, it follows very much of course that a receiver will be appointed.² Upon these principles, a receiver will not be ordered, where the fact of the dissolution of the partnership is disputed.³

Where the object of the suit is to continue, and not to dissolve, the partnership, the general is not to appoint a receiver;⁴ but where a suit has been instituted to compel partners to act according to the provisions of instruments into which they have entered, the Court will take care that the decree shall not be defeated by anything to be done in the meantime; and will appoint a receiver to protect the property;⁵ and receivers have been appointed at the suit of a shareholder of a company, where, through the conduct of its officers, the property of the company is in danger of being lost.⁶

The rules with regard to the appointment of a receiver, in the case of partnerships, have been thus stated.⁷ "If any one of the partners seeks to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver;⁸ generally, in thus interposing between the parties, the Court looks to a dissolution and general winding-up of the affairs.⁹ Where a dissolution is intended, or has already taken place, a Court of Equity will appoint a receiver, provided there has been some breach of the duty of a partner, or of the contract of partnership.¹⁰ Thus if, in breach of moral obligation, one partner, unjustly takes possession, and refuses to give security to his co-partner for his share of the

1 *Const v. Harris*, T. & R. 517; *Smith v. Jeyes*, 4 Beav. 503; *Baxter v. West*, 22 L. J. Ch. 169. V. C. K.; *Roberts v. Eberhardt*, Kay, 148; and see *Wilson v. Greenwood*, 1 Swanst. 481; *Chapman v. Beach*, 1 J. & W. 594; *Tibbitts v. Phillips*, 10 Haro. 355.

2 *Goodman v. Whitcomb*, 1 J. & W. 589; see also *Oliver v. Hamilton*, 2 Anst. 453. As to the question whether bills can be sustained for partnership accounts, without seeking a dissolution of partnership, see *ante*.

3 *Fairburn v. Pearson*, 2 M.N. & G. 144; and see *Peacock v. Peacock*, 16 Ves. 49.

4 *Hall v. Hall*, 3 M.N. & G. 79, 88; 12 Beav. 419 n.; and cases cited *ib.*; *Roberts v. Eberhardt*, Kay, 148.

5 *Const v. Harris*, T. & R. 496; *Morris v. Colman*, 18 Ves. 437; and see *Waters v. Taylor*, 15 Ves. 10; *Hall v. Hall*, 3 M.N. & G. 79, 91; 12 Beav. 414, 419, n.

6 *Sheppard v. Ozenford*, 1 K. & J. 491; *Evans v. Coventry*, 5 De G. M. & G. 911, overruling S. C. 5 D.ew. 75.

7 *Collyer on Partnership*, 240—342; and see *Lindley on Partnership*, 849, *et seq.*

8 *Wilson v. Greenwood*, 1 Swanst. 481; *Peacock v. Peacock*, 16 Ves. 49; *Mubank v. Revett*, 2 Mer. 406; *Goodman v. Whitcomb*, 1 J. & W. 589; *Blakeney v. Dufaur*, 15 Beav. 40; *Clegg v. Fishwick*, 1 M.N. & G. 294, 296.

9 *Waters v. Taylor*, *ibi sup.*; see *Harrison v. Arncliffe*, 4 Madd. 143; *Oliver v. Hamilton*, 2 Anst. 453.

10 *Harding v. Glover*, 18 Ves. 281; *Estwick v. Conningsby*, 1 Vern. 118; *Smith v. Jeyes*, 4 Beav. 503. In *Skip v. Harwood*, Reg. Lib. 1748, B. 617, a Receiver was appointed of a brewery.

stock, moneys, and securities;¹ or if he, in any respect, behaves unrighteously against the interest of the other partner, a receiver will be appointed.² So, also, if in breach of the contract of partnership, he carries on the trade with the partnership effects on his separate account, after the dissolution,³ and thus, or in any other manner, excludes his co-partner from that share to which he is entitled in winding up the concern, a receiver will be appointed."⁴

The same rules which prevail respecting the appointment of a receiver in a suit between partners, are applicable in a suit between the representative of a deceased partner and the surviving partner.⁵

Where all the partners are dead, and a suit is instituted between their representatives, a receiver will be appointed as a matter of course;⁶ and so, where one of the partners became bankrupt, a receiver was appointed, at the suit of the solvent partner, against the assignees.⁷

The Court will also appoint a receiver, pending an investigation into the title to an estate, in a suit for the specific performance of an agreement. The consideration of the question at whose expense the appointment should be made will be reserved.⁸

A receiver of the rents and profits of an infant's estate may, also, as we have seen, be appointed; and where no suit is pending, this may be done upon summons at Chambers: though the more usual course, in the latter case, is to appoint a guardian of the person and estate, without a receiver.⁹

1 *Peacock v. Peacock*, 16 Ves. 49; and *Milbank v. Revett*, 2 Mer. 405.

2 If partners quarrel, and one of them behaves unrighteously against the interest of the other, a Receiver will be appointed; but if partners quarrel, a Receiver will not merely on that account be appointed." Per Lord Eldon, in *Tezeira v. Da Costa*, in Chancery, Nov. 1815, Cook's MSS.; see *Hale v. Hale*, 4 Beav. 369.

3 *Harding v. Glover*, 18 Ves. 281.

4 *Blakeney v. Dufaur*, 15 Beav. 40; and see *Wilson v. Greenwood*, 1 Swanst. 481. The dissolution which takes place on the refusal of an appointee under a will to become a partner, is clearly not a dissolution arising from the exclusion of the appointee by the surviving partners, and will therefore be no foundation for a Receiver: *Kershaw v. Matthews*, 2 Russ. 62.

5 *De Tastet v. Bordieu*, 2 Bro. C. C. ed. Belt. 272, n.; and see *Madgwick v. Winble*, 6 Beav. 495; *Clegg v. Fishwick*, 1 McN. & G. 294, 298; *Davis v. Amer*, 3 Drew. 64; but see *Hartz v. Schrader*, 8 Ves. 317; 2 Nov. Sup. 106.

6 *Phillips v. Atkinson*, 2 Bro. C. C. 272.

7 *Freeland v. Stansfeld*, 2 Sm. & G. 479; 1 Jur. N. S. 8; and see *Wilson v. Greenwood*, 1 Swanst. 471, 482; *Fraser v. Kershaw*, 2 K. & J. 496.

8 *Boehm v. Wood*, 2 J. & W. 236; and see *Hall v. Jenkinson*, 2 V. & B. 125; *Stratton v. Davidson*, 1 B. & M. 434; *Osborne v. Harvey*, 1 Y. & C. C. 116; *Dawson v. Yates*, 1 Beav. 301; 2 Jur. 900.

9 *Ante*. As to lunatics, see *ante*.

Of what appointed.

A receiver may be appointed of the rents and profits of real estate and also of all personal estate which is capable of being reduced into possession. In *Davis v. The Duke of Marlborough*,¹ it was held that, in favor of equitable creditors, the Court will appoint a receiver of all property against which a legal creditor might obtain execution. Upon this ground, a receiver has been appointed of the profits of a rectory,² under an *elegit*. The appointment is not, however, confined to such property as is liable to be taken under an execution at law, but has been extended to whatever is considered in Equity as assets; and, therefore, in *Blanchard v. Cawthorne*,³ a receiver was appointed, at the instance of a judgment creditor, of the office of master forester of a royal forest. So, also, in *Palmer v. Vaughan*,⁴ the profits of the office of Clerk of the Peace for a county having been assigned for the payment of creditors, a receiver was appointed, pending the discussion of a question as to the validity of the assignment; but in *Cooper v. Reilly*,⁵ a receiver was refused, pending such a discussion, of the salary of Assistant Parliamentary Counsel to the Treasury; the Court being of opinion that, upon grounds of public policy, the salary of such an office was not assignable. A receiver has been appointed of a canonry;⁶ and may, it seems, be appointed of a college fellowship.⁷

A pension granted by the Crown is capable of being taken under a sequestration for want of an answer;⁸ and such a pension may, it seems, be the subject of a receiver.⁹ The rule, however, will not extend to the pension for past services,¹⁰ or to the half-pay¹¹ of an officer in the Army or Navy; which is, upon grounds of public

1 2 Swanst. 152.

2 *Silver v. Bishop of Norwich*, 3 Swanst. 112, n. (b); *White v. Bishop of Peterborough*, ib. 100. A registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a Receiver, under 1 & 2 Vic. c. 110: *Hewkins v. Gathercole*, 6 De G. M. & G. 1: 1 Jur. N. S. 481; reversing S. C. 1 Sim. N. S. 63; and see *Bates v. Bothers*, 2 Sm. & G. 500.

3 Sim. 506.

4 3 Swanst. 173.

5 2 Sim. 500; Affd. 1 R. & M. 540.

6 *Grenfell v. Dean of Windsor*, 2 Beav. 544.

7 *Feistal v. King's College, Cambridge*, 10 Beav. 491, 500; but see *Barkley v. King's College Cambridge*, ib. 602.

8 *Ante*.

9 *Noad v. Backhouse*, 2 Y. & C. C. C. 529; and see *Turnstall v. Boothby*, 10 Sim. 548.

10 *Lloyd v. Chestham*, 3 Giff. 171: 7 Jur. N. S. 1272; but see *Carew v. Cooper*, 4 Giff. 619: 10 Jur. N. S. 11; ib. 429: 12 W. R. 586, 767, L. C.

11 *McCarthy v. Gould*, 1 Ball & B. 347; *Stone v. Lidderdale*, 2 Aust. 533, 539; *Collyer v. Fallon*, T. & R. 450, 467.

policy, also exempt from the operation of a sequestration.¹ So, also, it has been held, that a pension granted by the 5 Anne, ch. 4, for the more honorable support of the dignities of the Duke of Marlborough to the persons, severally and successively, to whom the same should come by virtue of that Act, with a proviso that the acquittance of every such person should be a sufficient discharge, was upon grounds of public policy, inalienable, and therefore not the subject of a receiver: although the estates which, by the 5 Anne, ch. 3, were limited to the then Duke for life, with a remainder in tail, in such manner that they might always go along and be enjoyed with the titles and dignities, with a proviso, that they should not be aliened to the injury of the persons in remainder, were held to be alienable during the life of the person in possession, and to be, therefore, the subject of a receiver during his life.² A receiver will also be appointed of heirlooms,³ or of the tolls of a turnpike,⁴ canal,⁵ railway,⁶ market,⁷ or dock;⁸ but the Court will not appoint a receiver of parochial rates which are to be assessed and collected at a future period.⁹

It is not necessary, in order to authorise the Court to appoint a Receiver, that the property in respect of which he is to be appointed should be in England,¹⁰ or, indeed, in any of Her Majesty's dominions. Thus, in England, persons have been appointed to manage landed property, receive the rents and profits, and convert, get in, and remit the proceeds of property and assets, where such property has been situated in British India,¹¹ Canada,¹² China,¹³ Ireland,¹⁴ Italy,¹⁵ New South Wales,¹⁶ the West Indies,¹⁷ Demerara,¹⁸ and other places.

¹ *Ante*.

² *Davis v. Duke of Marlborough*, 1 Swanst. 74, 84; and see S. C. 2 Swanst. 108, 123.

³ *Kari Shaftesbury v. Duke of Marlborough*, Seton, 1025.

⁴ *Knapton v. Williams*, 4 Ves. 480, n. (a); *Dumville v. Ashbrooke*, 3 Russ. 98, n.; *Lord Creve v. Edleston*, 1 De G. & J. 98: 3 Jur. N. S. 1061; Seton, 1034.

⁵ *Fripp v. Chard Railway Company*, 11 Hare, 241: 17 Jur. 387: Seton, 1034; *Potts v. Warwick, &c., Canal Company*, Kay, 143, 143: Seton, 1034.

⁶ *Russell v. East Anglian Railway Company*, 3 McN. & G. 104, 106; *Furness v. Caterham Railway Company*, 25 Beav. 614, 619: 4 Jur. N. S. 1213.

⁷ *De Winton v. Mayor of Brecon*, 26 Beav. 553: 5 Jur. N. S. 882.

⁸ *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 352: 1 Jur. N. S. 529. As to Receivers of the property of companies, see Seton, 1034.

⁹ *Drewry v. Barnes*, 3 Russ. 94.

¹⁰ *Houlditch v. Marquis of Donegal*, 8 Bl. N. S. 301, 343; *Barkley v. Lord Roay*, 2 Hare, 308; *Faulstner v. Daniel*, 2 Hare, 204, n.: Seton, 1033.

¹¹ *Logan v. Princess of Coorg*, Seton, 1033, No. 1; *Keys v. Keys*, ib.: 1 Beav. 425.

¹² *Tyler v. Tyler*, Seton, 1039.

¹³ *Hodson v. Watson*, Seton, 1038.

¹⁴ *Houlditch v. Marquis of Donegal*, 8 Bl. N. S. 301, 343; Seton, 1007; but see *Re Trant*, and *Re Warner*, cited ib. 1008.

¹⁵ *Hinten v. Galli*, 24 L. J. 121: 2 Eq. 479, M. R.; Seton, 1030, No. 3.

¹⁶ *Underwood v. Frost*, Seton, 1033, No. 2.

17 Seton, 1036, 1037.

¹⁸ *Porter v. Porter*, Seton, 1036, No. 2; *Bunbury v. Bunbury*, 1 Beav. 318; Seton, 877, 1036.

In these cases, a person resident in England is sometimes appointed Receiver or manager, with authority to appoint an agent abroad;¹ and sometimes a person abroad is appointed Receiver or manager, with directions to consign or remit to some person resident in England.² Ordinarily, the person appointed to act abroad as Receiver or manager must give the like security of persons resident in this country.³

Who may be appointed.

Generally speaking, a Receiver should be a person wholly disinterested in the subject-matter of the suit; but, in some cases, a person mixed up with the suit may be appointed.⁴ In a suit to dissolve a partnership, one of the partners, who was willing to act without salary, has been appointed Receiver;⁵ and a retired partner, who had advanced all the capital, and was liable to the partnership debts, has been appointed Receiver: he being willing to act without salary.⁶ But in no case will a party to the cause be appointed: unless he is appointed by the Court at the hearing; or a direction, giving him leave to propose himself, has been given by the Court. This leave, if granted, is usually embodied in the order⁷ directing the appointment of a Receiver; but if it has not been refused, a subsequent order to that effect can be obtained, on summons at Chambers.⁸

A trustee, who is a party to the cause, will not, however, be appointed a Receiver with emolument, if any one else can be procured who will act with the same benefit to the estate;⁹ and even where he is disposed to act without emolument, the Court will not appoint a trustee to be a Receiver, if he is the person who ought to watch and check the Receiver, for the benefit of the parties interested;¹⁰ but where a testator appointed as trustee a person who for many years had been the paid Receiver and manager of his estate, the

1 See — v. *Lindsey*, 15 Ves. 91; *Cockburn v. Raphael*, 2 S. & S. 453; *Seton*, 1036, 103.

2 See *Seton*, 1036-1039.

3 *Ibid.*; *Cockburn v. Raphael*, 2 S. & S. 453; *Seton*, 1038. As to the security of Receivers, see *post*.

4 *Fingal v. Blake*, 2 Moll. 50.

5 *Wilson v. Greenwood*, 1 Swanst. 471, 483; *Blakeney v. Dufaur*, 15 Beav. 40, 44.

6 *Hoffman v. Dunoon*, 18 Jur. 69, V. C. W.

7 See forms, *Seton*, 1003, Nos. 4, 59.

8 *Seton*, 1006; and see *Banks v. Banks*, 14 Jur. 659, M. R.

9 *Fingal v. Blake*, 2 Moll. 50; *Sykes v. Hastings*, 11 Ves. 363, 364; but see — v. *Jelland*, 3 Ves. 72; see also *Powys v. Blgrave*, 18 Jur. 462, V. C. W., where a tenant for life was appointed receiver on his undertaking to act without salary.

10 *Anon.*, 3 Ves. 515; *Sykes v. Hastings*, 11 Ves. 363, 364; *Sutton v. Jones*, 15 Ves. 584.

tenant for life being an infant, the Court continued the trustee as Receiver at a salary.¹ The rule, that the Court will not sanction the appointment, as Receiver, of a person whose duty it is to check and control the individual appointed, is extended to other persons besides trustees. Thus, it has been held, that, as it is the duty of the next friend of an infant to watch the accounts and conduct of a Receiver of the infant's estate, the two characters are incompatible with each other;² and, in *Taylor v. Oldham*,³ Lord Eldon held that the son of a next friend ought not to be the Receiver.

Upon similar grounds it has been held, that a solicitor in the cause cannot be appointed receiver: because it is his duty to control the receiver's accounts.⁴ It is no objection, however, to a person proposed, that he is a practising barrister;⁵ and although, in *Wynne v. Lord Newborough*,⁶ Lord Eldon appears to have considered that the circumstances of the gentleman who was appointed being a barrister, practising at a distance from the estate, was one which deserved consideration, yet many instances have since occurred in which barristers practising in London have been appointed receivers of estates at a distance.

The appointment of a Member of Parliament,⁷ or a Peer,⁸ as receiver, is, it seems, objectionable, if any person possessed of equal fortune can be found who is willing to act.

It has also been held, that the Receiver-General for a county should not be appointed a receiver: for, having given security to the Crown, if he were to become indebted to the Crown and to the estate, the Crown might, by its prerogative process, sweep away all his property.⁹

In *Kemp v. Jones*¹⁰ a receiver was granted with liberty to the defendant to propose himself as such, without salary.

¹ *Bury v. Newport*, 23 Beav. 30.

² *Stone v. Wishart*, 2 Madd. 64.

³ Jac. 527, 529.

⁴ *Garland v. Garland*, 2 Ves. J. 137. In *Bagot v. Bagot*, 3 Jur. 1063, Sir Lancelot Shadwell, V.C., on the application of a married woman for a receiver of her separate estate, appointed her solicitor to that office, on her nomination in Court: although a strong affidavit was made by the husband showing the unfitness of the solicitor for the office. The party appointed undertook to act as receiver without salary.

⁵ *Garland v. Garland*, 2 Ves. J. 137.

⁶ 15 Ves. 283.

⁷ *Wynne v. Lord Newborough*, 15 Ves. 283.

⁸ *Attorney-General v. Gee*, 2 V. & B. 203.

⁹ *Attorney-General v. Day*, 2 Madd. 240, 253. See now, however, as to Crown debts, Prov. Stat. 29 & 30 Vic. ch. 43.

¹⁰ 12 Grant, 265.

Mode and Effect of Appointment.

Except in the cases of infants,¹ the Court has no jurisdiction to appoint a receiver, unless a suit is pending; and if the application for the receiver is made before decree, it will not be granted unless a bill has been filed containing a specific prayer that a receiver may be appointed.²

At the hearing,³ however, or after the decree,⁴ a receiver may be appointed, although not prayed by the bill, if the circumstances of the case require it: and the application may be granted after decree, although it has been previously refused, if a state of facts entitling the party to a receiver appears upon the proceedings in the cause.⁵

A receiver may be appointed after an administration decree, in a suit commenced by summons.⁶

Where the original bill had been answered, it was held that the pendency of a plea to the amended bill did not prevent a motion for a receiver.⁷

After decree, the application for a receiver may be made by one defendant against a co-defendant⁸ but before decree, the application must, except under very special circumstances, be made by the plaintiff:⁹ and where made at the hearing of a redemption suit, the application was refused.¹⁰

Originally, a receiver could only be appointed after answer but this rule was broken through by Lord Bathurst, in the case of *Crompton v. Bearcroft*,¹¹ and since that case, the appointment

1 *Ante*; and see as to lunatics, *ante*.

2 *Pare v. Clegg*, 7 Jur. N. S. 1136: 9 W. R. 216, M. R.; but see *Malcolm v. Montgomery*, 2 Moll 509.

3 *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

4 *Bowman v. Bell*, 14 Sim. 392; *Wright v. Vernon*, 3 Drew. 112; *Thomas v. Davies*, 11 Beav. 29.

5 *Attorney-General v. Mayor of Galway*, 1 Moll. 95-104.

6 *Re Bywaters, Sargent v. Johnson*, 1 Jur. N. S. 227, V. C. W.; *Brooker v. Brooker*, 3 Sm. & G. 475:

3 Jur. N. S. 381; and see *ante*.

7 *Thompson v. Selby*, 12 Sim. 100.

8 *Robinson v. Hadley*, 11 Beav. 614.

11 2 Bro. C. C. 153, n.

8 *Hiles v. Moore*, 15 Beav. 175.

10 *Barlow v. Gains*, 8 Beav. 329.

has been made known before answer, whenever the justice of the case required it,¹ and, in a case of urgency, even before appearance.²

The application for a receiver is usually made by motion;³ and except in a suit commenced by notice of motion, or by consent, it cannot be made at Chambers in the first instance: although any vacancy which may occur in the office, by death, or otherwise, may be filled up by an order made there.⁴

Notice of the motion must be served on the opposite party: the general rule of the Court being, that an application for a Receiver cannot, like a motion for an injunction, be made without notice.⁵ If, therefore, a receiver is to be applied for before the expiration of the time for answering, notice of the motion must be served upon the defendant personally: to authorize which, there must be a previous application to the Court for leave to make such service;⁶ and the fact of such leave having been obtained must be mentioned in the notice of motion.⁷ The rule, however, which requires previous notice to be served upon a defendant who has not answered is subject to exception where the defendant has absconded to avoid service, and, therefore, cannot be served.⁸

The application must be supported by evidence of the facts relied upon, as rendering the appointment proper; and must, if the application is made before decree, be founded on the allegations of the bill.⁹

Formerly, if the application was made after answer, the plaintiff could only rely on the admissions contained therein; and could not enter into evidence in opposition thereto;¹⁰ but now, upon any application for a receiver, or to discharge an order appointing a

1 *Pitcher v. Halliar*, 2 Dick. 580; *Vann v. Barnett*, 2 Bro. C. C. 158; *Middleton v. Dodswell*, 13 Ves. 266; *Duckworth v. Trafford*, 13 Ves. 223; *Metcalf v. Pulvertoft*, 1 V. & B. 180, 183; *Davis v. Duke of Marlborough*, 1 Swanst. 74; 2 ib. 115; *Tanfield v. Irvine*, 2 Russ. 149; *Aberdeen v. Chitty*, 3 Y. & C. Ex. 379; *Woodyatt v. Grealey*, 8 Sim. 180, 183, 189; and see *Middleton v. Sherburne*, 4 Y. & C. Ex. 358.

2 *Tanfield v. Irvine*, 2 Russ. 149; *Hart v. Tulk*, 6 Hare, 611; *Meaden v. Sealey*, ib. 620; 13 Jur. 297.

3 A petition has been made use of, where the application was by the defendant; *Hiles v. Moore*, 15 Beav. 176; and see *Barlow v. Gains*, 8 Beav. 329, 331.

4 *Blackborough v. Ravenhill*, 16 Jur. 1085; V. C. S.; *Grote v. Bing*, 9 Hare, App. 50.

5 *Per Leach*, Arg. 1 V. & B. 183; *Caillard v. Caillard*, 25 Beav. 512.

6 *Hill v. Rineell*, 2 M. & C. 641; *Ramsbottom v. Freeman*, 4 Beav. 145; *Meaden v. Sealey*, 6 Hare, 620.

7 See ante.

8 *Dowling v. Hudson*, 14 Beav. 423, 424, n.; and see *Pitcher v. Halliar*, 2 Dick. 580; *Gibbins v. Mainwaring*, 9 Sim. 77; ante.

9 *Dawson v. Yates*, 1 Beav. 301, 306; 2 Jur. 960.

10 See *Goodman v. Whitcomb*, 1 J. & W. 589; *Glassington v. Thwaites*, 1 S. & S. 134; *Kershaw v. Mathews*, 1 Russ. 361.

receiver, the answer of the defendant is, for the purpose of evidence on such application, to be regarded merely as an affidavit of the defendant; and affidavits may be received and read in opposition thereto.¹

When there is a reference to the Master to enquire what lands are partnership property, a motion to appoint a receiver is informal.²

The order referring it to the Master to appoint a Receiver is brought into his office in the usual way by filing a copy with him. Our order 278 provides that "The party prosecuting the order for a Receiver is to obtain an appointment or a warrant from the Judge or Master, and to serve the same on all the necessary parties, naming in the copy thereof served, the proposed Receiver, and his sureties."

The warrant is underwritten, "*To appoint A. B., of the city of H., esquire, Receiver under the order in the cause dated and C. D., of the same place, merchant, and E. F. of the same place, gentlemen, are proposed as his sureties.*" The warrant is served on all the parties to the suit whether parties by bill or by order of Court, or parties added in the Master's office, having an interest in the property of which it is proposed to appoint a receiver.

Order 279 provides that "At the time appointed, the party prosecuting the order is to bring into the Judge's chambers, or the Master's office, the recognizance or bond proposed as security; the bond or recognizance is to be to the Master." This means the Master, to whom the reference is made. It not unfrequently happens that the appointment of another person is desired by some of the parties interested. The mode of proceeding in such a case is pointed out by another order which provides that "Any other party desirous of proposing another person as receiver, is to serve notice of his intention so to do upon the other parties naming in such notice the person proposed by him as receiver, and his sureties, and is then in like manner to bring into the Judge's chambers or Master's office the recognizance or bond proposed by him as security." The next order provides that "At the time named in

¹ 15 & 16 Vic. ch. 86, sec. 59; but we have no provision similar to this, either by Statute or by our Orders.

² *Bates v. Tatham*, 5 U. C. L. J. 40.

the appointment or warrant the Judge or Master is, in the presence of the parties, or those who attend, to consider of the appointment of the receiver, and to determine respecting the same; and to settle and approve of the proposed security."

In order to make an appointment the Master requires evidence (usually given *vive voce*) on the return of the warrant, of the fitness of the proposed receiver; and where there is a counter proposal, he takes the evidence as to both of the persons proposed, and decides according to it. Having made his decision, he then settles the draft recognizance or bond, marking on the margin "settled. A. B., Master, this. day of." The Master enters in his book that he has appointed A. B., Receiver, but he does not sign the appointment until the recognizance is executed and filed; and this entry does not amount to a complete appointment—it is merely an indication that on the security being perfected he will sign the official appointment presently to be mentioned. Having done this, and settled the form of recognizance, it will be necessary for him to fix the amount in which the receiver and his sureties are to be bound. This is ascertained by an affidavit stating the yearly or other value of the property. If the parties are prepared with this affidavit, or if they desire to give *vive voce* evidence on the point (for the Master may adopt either course in his discretion) he may at once settle the amounts to be inserted in the recognizance. If, however, they are not prepared, the Master appoints a day to receive the evidence. Having ascertained the value of the property or the yearly value, as the case may be, the Master fixes the amount of the recognizance. It is to be understood that if the property be personal, such as the receiver might dispose of, its value is the amount to be secured; but if the property be real estate, of which he could make no disposition, its yearly value, will be the amount to be secured. In order to make clear the practice in preparing the recognizance and affidavit of justification required from the sureties, it is supposed that the value of the property is \$1,000. The recognizance in such a case will bind the receiver in \$2,000 (being double the value of the property), and each surety (supposing there are two) in \$1,000 (being the value). And each surety will justify to the extent of \$2,000 (being double the value).

It sometimes occurs that the value is so great that it becomes unreasonable to expect a Receiver to find two sureties able to justify to the extent required; in such a case the Master will permit him to propose as many sureties as he may find necessary. It may here be noticed that where a surety of a Receiver dies pending the suit, the receiver may obtain *ex parte* an order referring it to the Master to approve of a new one.¹

It may here be mentioned that by the English practice the Recognizance was entered into before the Master; or where the parties resided out of London before a Master extraordinary—but here, it may be entered into before any commissioner appointed to take affidavits.

If any party desires to bring the propriety of the Master's appointment of a Receiver before the Court, it is done by appealing from his decision, in the ordinary way.

It may here be noticed, that order 537 provides that "Committees of the persons and estates of lunatics, idiots and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as Receivers, as nearly as circumstances will permit." And order 588, provides that "Where an order, directs the appointment of a Receiver, Committee of the person and estate of a lunatic, idiot, or person of unsound mind, or a Guardian, other than a Guardian *ad litem*, and does not regulate the matter herein provided for, the Master is to fix the time or times in each year when the person appointed is to pass his accounts and pay his balances into Court, and in default of compliance with such direction, the person appointed may, on the passing of his accounts, be disallowed any salary or compensation for his services and may be charged with interest upon his balances."

The security usually required is the recognisance of the receiver,² with two sureties.³ It is generally required to be for double the annual rental,⁴ or value of the property likely to be got in by the receiver during the currency of his periodical account. The sureties may be

¹ *Brown v. Perry*, 1 Cham. Rep. 284; and see Order 283.

² Where the receiver had been improperly omitted to be joined with his sureties in the recognisance, the solicitor was made personally liable for a loss occasioned thereby: *Re Ward, Stammers v. Ross*, 31 Beav. 1.

³ *Mead v. Lord Orrery*, 3 Atk. 237; *Seton*, 1007.

⁴ *Seton*, 1007.

bound in unequal sums; and the number of sureties may be increased, so as to diminish the amount for which each is to be liable;¹ but it is not regular to take, as security for a receiver, an assignment of a mortgage belonging to him,² or (even by consent,) the bond of an incorporated guarantee association:³ instead of the usual recognisance. A recognisance of the receiver only, has, however, under special circumstances, been considered sufficient. Thus, where the parties in the cause name the receiver, the Court will, by consent, appoint him upon his own recognisance only;⁴ and where the appointment of a person to be receiver was made by the testator and confirmed by the Court, the personal recognisance of such receiver was held sufficient;⁵ but it seems that the Court will not dispense with the usual security, unless all the parties are *sui juris* and consent.⁶

The sureties must be resident within the jurisdiction;⁷ and upon any event, such as death or bankruptcy, happening, which would prevent the recognisance being effectually put in force against them, an order will be made at Chambers, on motion, directing the receiver to give a new security.⁸ Where, also, the property of which a receiver has been appointed has increased in value during the receivership, additional security has been required to be given by him.⁹

The order appointing the receiver ought to state distinctly, on the face of it, over what property the receiver is appointed;¹⁰ or else refer to the pleadings, or some document in the cause, which describes the property.¹¹ It usually directs the receiver to pass his accounts from time to time, and to pay the balances found due from him into Court, to the credit of the cause: to be there invested and accumulated, or otherwise, as may be directed.¹²

¹ *Seton*, 1007.

² *Mead v. Lord Orrery*, 3 Atk. 237.

³ *Manners v. Furze*, 11 Beav. 30: 12 Jur. 129. Such a bond has been held sufficient as security for costs: *Plestone v. Johnston*, 1 Sm. & G. App. 20: 2 W. R. 3; and see as to official liquidators, Ord. 11 Nov. 1862, r. 10: 8 Jur. N. 8 Pt. II., 515.

⁴ *Countess of Carlisle v. Lord Berkeley*, Amb. 599; *Ridout v. Earl of Plymouth*, 1 Dick. 68; *Countess Carlisle v. Earl Carlisle*, cited *ib.*; *Wilson v. Wilson*, 11 Jur. 793, V. C. K. B.

⁵ *Hibbert v. Hibbert*, 3 Mer. 681, 683.

⁶ *Tyler v. Tyler*, 17 Beav. 583; and see *Bainbridge v. Blair*, 3 Beav. 421, 424; *Manners v. Furze*, 11 Beav. 30: 12 Jur. 129.

⁷ See *Cockburn v. Raphael*, 2 S. & S. 453.

⁸ *Seton*, 1019.

⁹ *Spence v. Handford*, M. R. in Chambers, 17 Feb. 1865.

¹⁰ *Crow v. Wood*, 13 Beav. 271.

11 *Seton*, 1005.

¹² For forms of orders directing receivers to be appointed, see *Seton*, 1002.

If the appointment is of rents and profits of real or leasehold estates, the order directs the tenants of such estates to attorn and pay their rents in arrear and growing rents to the receiver; but this direction should be omitted where the estates are out of the Province.¹

If the appointment is of outstanding personal estate, or of partnership property, the order generally directs the executors, or other parties, to deliver over to the receiver all securities in their hands for such estate or property, and also the stock-in-trade and effects of the partnership, together with all the books and papers relating thereto.²

If the receiver is appointed on behalf of one of several incumbrancers, the order generally contains a declaration that the appointment of the receiver is to be without prejudice to the rights of, or is not to affect, the prior incumbrancers upon the estate who may think proper to take possession of the estates and premises, by virtue of their respective securities; and usually directs an inquiry what incumbrances there are affecting the estate, and the priorities thereof respectively; and orders that the receiver do, out of the rents and profits to be received by him, keep down the interest and payments in respect of such incumbrances, according to their priorities; and be allowed the same in passing his accounts.³

Unless the person to be appointed receiver is named in the order, the appointment is made in a Master's office or in Chambers. Any party to the proceedings may propose a person to be appointed receiver: although a stranger cannot do so.⁴ The most fit person should be appointed, without regard to the party by whom he has been proposed;⁵ and, other things being equal, the person proposed by the party having the conduct of the proceedings is usually preferred.

¹ *Seton*, 1007, 1039.

² For forms of orders, see *Seton*, 1002, 1030.

³ *Ibid* 1025, 1027. See *Lewis v. Lord Zouche*, 2 Sim. 388, 393: and *Smith v. Eppingham*, 2 Beav. 232 as to the remedies of incumbrancers; see also *ante*.

⁴ *Attorney-General v. Day*, 2 Madd. 246.

⁵ *Lespinasse v. Bell*, 2 J. & W. 436.

Where the Master or a Judge has exercised his discretion in the selection of the person appointed, it will not be interfered with on appeal.¹

The costs incurred with reference to the completion of the receiver's security, and subsequent thereto are, in the first instance, paid by the receiver, and will be allowed him in passing his first account.

A receiver appointed by the Court is appointed on behalf of all parties; and not of the plaintiff, or of one defendant only;² therefore, if any loss arises from deficiency in his accounts, the estate must bear it, as between the parties to the suit.³ The effect of the appointment however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered as his receiver.⁴ Where, however, a receiver had been appointed in consequence of the inability of the vendor of an estate sold under a decree to make out his title, the Court thought that the expenses of the receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of the fund in Court, together with the costs of the application.⁵

A Receiver although an officer of the Court, stands in the position of trustee for all interested in the estate or fund,—therefore in making the appointment, the Court will endeavor to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feeling of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication.⁶

1 *Ley v. Ley*, 27 L. T. 267, L.J.J.; and see *Re Agriculturist Cattle Company*, 7 Jur. N.S. 590; 9 W. R. 682, L.J.J.; see also *Creuze v. Bishop of London*, 2 Bro. C. C. 253; *Thomas v. Dawkin*, 3 Bro. C. C. 508; 1 Ves. J. 452; *Garland v. Garland*, 2 ib. 137; *Bowersbank v. Collasseau*, 3 ib. 164; *Wilkins v. Williams*, ib. 588; *Tharpe v. Tharpe*, 12 Ves. 317, 320; *Wynne v. Lord Newborough*, 15 Ves. 284; *Attorney-General v. Day*, 2 Madd. 246, 253, and the cases cited ib. 252, 253, as to the extent of the control exercised by the Court over the appointment of receivers by the Masters under the former practice.

2 *Davis v. Duke of Marlborough*, 2 Swaust. 118; *Bainbrigg v. Blair*, 3 Beav. 421, 424; and see *Neale v. Pink*, 3 McN. & G. 476.

3 *Lord Hutchinson v. Lord Massacrene*, 2 Bell. & B. 55.

4 *Sharp v. Carter*, 3 P. Wms. 379; *Boehm v. Wood*, T. & R. 346.

5 *McLeod v. Phelps*, 2 Jur. 962, V. C. E.

6 *Simpson v. O. & P. R. Co.* 1 Cham. Rep. 99.

It has been already stated, that where sequestrators, upon *meane* process, are in possession of the lands and tenements in question in the cause, the appointment of a receiver of the rents and profits will have the effect of discharging the sequestration.¹

Where a receiver has been appointed of real or leasehold estates the parties to the record are usually directed by the order to deliver up to him the possession of such parts of the property as are in their holding;² and the tenants of such other parts as are let are ordered to attorn to the receiver, and to pay to him their rents in arrear, as well as the growing rents.³ The receiver, therefore, as soon as his appointment is complete, should apply to the parties, and tenants to deliver possession and attorn accordingly; and if they refuse, he should report their refusal to the solicitor of the party on whose application the order was made: to the intent that he may take the necessary steps to enforce the order of the Court.⁴

Any party to the proceedings who is in possession of property ordered to be delivered to the receiver, and who neglects to deliver accordingly, should be served personally with the order directing such possession to be delivered; and if possession is still withheld from the receiver, an application should be made by motion, *ex parte*, for a writ of assistance, directed to the Sheriff of the county wherein the property is situate, to put the receiver into possession, pursuant to the order.⁵ The application should be supported by an affidavit of service of the order, and of non-compliance. The writ is prepared, issued and executed in the manner before explained.⁶

If a party to the proceedings is not directed to deliver up possession to the receiver, he is not bound to do so; but he will be charged with an occupation rent, for the premises in his possession.⁷

1 *Ante*; *Shaw v. Wright*, 3 Ves. 22, 24.

2 See *Seton*, 1015; and see form of order, *ib.* 1022. In *Davis v. Duke of Marlborough*, 2 Swans. 193, 116, the order appointing the receiver directed the Duke to deliver up possession to him.

3 See form of order, *Seton*, 1002, No. 1.

4 See *Griffith v. Griffith*, 9 Ves. 8, 401; *Ireland v. Bado*, 7 Beav. 55; *Parter v. Dunn*, 8 Beav. 457; *Herman v. Dunbar*, 23 Beav. 312. As to the course to be adopted, where the receiver finds another receiver in possession of the property, see *Ward v. Swift*, 6 Hare, 312; 12 Jur. 173; and as to obtaining the previous leave of the Court, where the receiver is appointed under a decree *pro confesso*, see *ante*.

5 See form of order in *Seton*, 1238.

6 *Ante*.

Randfield v. Randfield, 7 W. R. 651, V. C. K. The party will not be ordered, before the hearing, to pay an occupation rent from a date previous to the order fixing the rent and appointing the receiver: *Lloyd v. Mason*, 2 M. & C. 487.

Where any tenant of the property refuses to attorn to the receiver, or to pay him any arrears of rent,¹ he should be served with a copy of the order directing the appointment of a receiver, and of the order or certificate completing the appointment,² and with a notice in writing, signed by the receiver, requiring him to attorn and pay; and on refusal, the tenant should be served with a notice of motion to attorn and pay within a limited time after the service of the order to be made on the motion.

The person served may appear on the motion, and inform the Court whether he is in possession as tenant or not.³ If he does not appear, the order will be made upon an affidavit of service of the notice of motion, orders certificate, and notice to attorn, and on proof by affidavit of the refusal to attorn.⁴ The order will be made without costs.⁵ A copy of the order indorsed in the usual manner, must then be served personally upon the person thereby directed to attorn; and upon production to the Record and Writ Clerk of an affidavit of such service, and of an affidavit by the receiver of non-compliance, he will seal an attachment against the disobedient party. The attachment is prepared, issued and executed in the manner before explained.⁶

In *Reid v. Middleton*,⁷ it appeared that the tenant in possession had not agreed to pay any specific rent; and, in consequence, an order was made, that an occupation-rent should be settled by the Master, and that the tenant should pay the arrears and future payments of such occupation-rent; and where the tenant had not attorned, he was, nevertheless, ordered to pay his arrears of rent within fourteen days.⁸

It may be mentioned here, that the attornment to the Receiver will not enure for the benefit of the person who may ultimately be found to have in him the legal estate.⁹

The possession of a Receiver is deemed to be that of the Court; and any attempt to disturb it, without the leave of the Court first

1 See *Codrington v. Johnstons*, 1 Beav. 524; *Duffield v. Elwes*, 11 Beav. 590.

2 See *ante*.

3 *Reid v. Middleton*, T. & R. 455; *Hobhouse v. Holcombe*, 2 De G. & S. 208

4 For forms of orders, see *Seton*, 1012, No. 1; 1013, No. 2.

5 *Hobhouse v. Holcombe*, 2 De G. & S. 208.

6 *Ante*; *Braithwaite's Pr.* 172, 173.

7 T. & R. 455.

8 *Hobson v. Sherwood*, 19 Beav. 575; and see *Mitchel v. Duke of Manchester*, 2 Dick. 787.

9 *Evans v. Mathias*, 7 El. & Bl. 590; 3 Jur. N. S. 793, Q. B.; and see *Hughes v. Hughes*, 3 Bro. C.C. 87; 1 Ves. J. 161. As to attornment in general, see *Woodfall*, 206, 208; and to a receiver in Chancery, *ib.* 51.

obtained, will be a contempt on the part of the person making it ; and will be restrained by injunction ;¹ or the person making it will be committed for his contempt.²

This was settled in *Angel v. Smith*,³ where the rule was laid down, both with respect to Receivers and sequestrators, that their possession is not to be disturbed without leave ; and the same rule will be acted on, in cases where the Receiver has been appointed erroneously,⁴ or without prejudice to the rights of persons having prior charges.⁵ The rule does not, however, apply until a Receiver has actually been appointed ; and a direction to appoint a Receiver is not, in this respect, equivalent to the order appointing him.⁶ The Court will not protect a Sheriff executing process, after he has notice from a Receiver ;⁷ but will order him to withdraw from the possession, and restrain proceedings against him by the execution creditor ;⁸ and where the Sheriff has taken property, part of which is claimed by a Receiver, the latter will be directed to give a list of the property claimed by him to the Sheriff ; who will be ordered to withdraw from the possession of the specified property.⁹ It has recently been held, in Ireland, that where a Receiver has been appointed over the estate of a tenant for life, the remainderman has a right, immediately on the decease of the tenant for life, to go into possession, without making any application to the Court.¹⁰

Any person who considers himself prejudiced by having a Receiver put in his way, must apply by motion, on notice, for an inquiry as to his interest, or for leave to commence proceedings against the Receiver ;¹¹ and he must do this, although his right to

1 *Angel v. Smith*, 9 Ves. 335 ; *Tink v. Rundle*, 10 Beav. 318 ; *Evelyn v. Lewis*, 3 Hare, 472 ; *Russell v. East Anglian Railway Company*, 3 M.N. & G. 104, 117 ; *Turner v. Turner*, 15 Jur. 218, V. C. Ld. C. ; *Hawkins v. Gathercole*, 1 Drew. 12 ; *Randfield v. Randfield*, 1 Dr. & Sm. 310 ; *Lane v. Sterne*, 3 Giff. 69 ; 9 Jur. N. S. 320.

2 *Broad v. Wickham*, 4 Sim. 511 ; *Marsh v. Goodall*, Seton, 1013 ; and see *Ward v. Swift*, 6 Hare. 312 ; 12 Jur. 173.

3 9 Ves. 335.

4 *Anes v. Trustees of the Birkenhead Docks*, 30 Beav. 332 ; 1 Jur. N. S. 539 ; *Randfield v. Randfield*, *ubi sup.*

5 See *Anon.*, 6 Ves. 287 ; *Bryan v. Cornick*, 1 Cox, 422.

6 *Defries v. Creed*, 11 Jur. N. S. 360 ; 13 W. R. 632, V. C. K.

7 *Try v. Try*, 13 Beav. 422 ; *Book v. Cook*, 2 Phil. 691 ; 2 De G. & S. 498 ; *Onyon v. Washbourne*, 14 Jur. 497, V. C. E.

8 *Russell v. East Anglian Railway Company*, 3 M.N. & G. 104.

9 See *Wilmer v. Kidd*, Seton, 1002, No. 2, where the order is given.

10 *Re Stack*, 13 Ir. Chan. Rep. 213.

11 *Goume v. West*, 2 Dick. 472 ; *Anon.*, 6 Ves. 287 ; *Bryan v. Cornick*, 1 Cox, 422 ; *Angel v. Smith*, 9 Ves. 335, 336 ; *Brooks v. Greathed*, 1 J. & W. 176, 178 ; *Smith v. Earl of Epsingham*, 2 Beav. 282 ; *Gooch v. Haworth*, 8 Beav. 428 ; *Russell v. East Anglian Railway Company*, *ubi sup.* ; *Potts v. Warwick, &c., Canal Company*, Kay, 142.

take possession is clear.¹ The inquiry as to interest is conducted in the same manner as it would be if the property were in the possession of sequestrators under a commission of sequestration.²

It may be mentioned here, that where an ejectment was actually brought against a Receiver, although it was without the previous leave of the Court, the Court directed an inquiry whether it would be for the benefit of the parties interested, who were adults, that the Receiver should defend the ejectment, and charge the expense in his accounts.³

Where a Receiver paid a judgment creditor of the defendants', an amount demanded by him under a garnishee order obtained on a consent improperly given by the Receiver, the judgment creditor was, on motion, ordered to refund the amount to the defendants; and he and the Receiver were directed to pay the costs of the motion.⁴

The appointment of a Receiver does not affect the rights of the landlord of the premises; but he will not be permitted to exercise those rights without first obtaining the leave of the Court; and where he has not distrained, and the furniture in the house of a tenant has been sold under the direction of a Receiver, the landlord has no priority over the other creditors in the proceeds of the sale.⁵

Salary and Allowances.

Unless it is otherwise ordered, (as where he consents to act without salary,⁶ a Receiver will be allowed a salary, or have some other allowance made to him, for his care and pains in the execution of his duties. The amount of the salary or allowance is not, in general, fixed till the passing of the first account: when the Receiver will be allowed either a per centage upon his receipts, or a gross sum, by way of salary.

¹ *Anon.*, 6 Ves. 287.

² *Ante.*

³ *Anon.*, 6 Ves. 287.

⁴ *De Winton v. Mayor of Brecon* 28 Beav. 200; 6 Jur. N. S. 1046.

⁵ *Sutton v. Rees*, 9 Jur. N. S. 456, V. C. K.

⁶ *Ante.*

The allowance to a Receiver of the rents and profits of a landed estate is generally 5*l.* per cent. on the gross amount received. This allowance may, however, be increased, if there is any special difficulty in the collection; or diminished, or a stated salary allowed, where the rental is very considerable.¹ Under very special circumstances, an order has been made that the Receiver should be allowed such salary as the Judge might, on the passing of each account, think reasonable.²

The subject of the amount proper to be allowed to a Receiver, by way of salary, underwent investigation in *Day v. Croft*; ³ and, in the judgment in that case, Lord Langdale, M. R., who had inquired of the Masters what were the principles upon which they acted, and the practice adopted on this point in their several offices, thus states the result of his inquiries: "The Masters have each of them been good enough to furnish me with a certificate; and I find that there is no general rule which universally prevails as to the allowance to a receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small or of the payments being very frequent, as weekly payments, then the allowance is increased. On the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent. is allowed. One of the Masters has certified to me a case where, after consideration, he allowed only 4*l.* per cent. for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case in which the sum paid to the receiver amounted to 300*l.* a-year for the first year; the Receiver was afterwards allowed 150*l.* only for a succession of years; which was afterwards reduced to 50*l.* a-year, for the receipt of the same rents. It cannot, therefore, be considered as an universal or general rule that 5*l.* per cent. should be allowed, even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty; or diminished if there be any extraordinary facility in the collection. With respect to other receipts, each

¹ *Seton*, 1006; see *Day v. Croft*, 2 Beav. 488: 4 Jur. 429; *Malcolm v. O'Donoghue*, 3 M. & C. 53

² 1 Jur. 838; see also *Shore v. Shore*, 4 Drew. 501, 510, as to the party to bear the allowance.

³ *Neave v. Douglas*, 25 L. J. Ch. 756, M. R.

⁴ 2 Beav. 488, 491, *ubi sup.*

Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2½l. per cent; but, for gross sums of money, this has been very much reduced, and 1½l. per cent. has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver." In the case above cited, an objection was taken to an allowance which had been made to the Receiver. of 5l. per cent. on certain gross sums, which had been paid to him for the redemption of mortgages and annuities, and for annuities and interest upon mortgages; and Lord Langdale thought that there was sufficient in the case to warrant an order to review the report.¹

The practice of the Masters' offices, as above stated, is generally followed in the Chambers of the Judges, in fixing the salary, or making an allowance, to a Receiver.

In connection with this subject it may be mentioned, that where a Receiver had been appointed to get in the outstanding estate of a testator, Lord Langdale held that the Receiver had not such a vested right to collect the whole estate, as entitled him to prevent the money being paid into Court, without passing through his hands, in order that he might obtain his poundage; and made an order, on the petition of some of the parties interested, that a debtor to the estate, who was willing to pay the amount of his debt to the Accountant-General at once, might be at liberty to do so.²

A Receiver may be entitled to allowances beyond his salary, for any extraordinary trouble or expenses he may have been put to in the performance of his duties; or in prosecuting or defending any legal proceedings brought by or against him.³ If, however, such allowances are objected to, they will not, in general, be sanctioned, unless they have been incurred with the approbation of the Court or Judge.⁴

¹ *Day v. Croft*, 2 Beav. 488; 4 Jur. 429.

² *Hugh v. Gratton*, 1 Beav. 201.

³ *Potts v. Leighton*, 15 Ves. 276; *Courand v. Hammer*, 9 Beav. 3.

⁴ *Re Ormsby*, 1 B. & B. 189; *Swaby v. Dickon*, 5 Sim. 629; *Bristows v. Needham*, 2 Phil. 190.

Upon this ground, Lord Cottenham discharged an order of Sir Lancelot Shadwell, V.C., directing the Master to review his report upon a Receiver's account, with reference to certain sums which the Receiver had claimed on account of journeys taken by him to France, for the recovery of property belonging to the estate before the tribunals there, but which the Master had disallowed. It is to be observed, however, that the result of the journeys had been unfavourable, and that no benefit had accrued to the estate from the proceedings instituted; but it may be inferred, from his Lordship's judgment, that if success had attended the exertions of the Receiver, and he could have shown that such success had arisen from his presence in Paris, he would have considered it "inequitable for the parties to take the benefit of such exertions, without defraying the expenses which had attended them, although no previous authority for incurring them had been given."¹

In a case before Sir Anthony Hart, in Ireland, where the Receiver of a lunatic's estate had instituted proceedings, which, being wrong in form, he abandoned, and afterwards took other proper proceedings, which were successful for the estate, the Court refused to allow him the costs of the abandoned proceedings: although the Master reported that the Receiver had acted *bona fide*, and ought to be allowed the costs.²

Where an application by a defendant against a Receiver was refused with costs, and the defendant was unable to pay the costs, the Receiver was held to be entitled to deduct his costs, as between solicitor and client, from the balance in his hands.³

Powers, Duties, and Liabilities of Receivers.

The course to be pursued, to obtain possession or attornment of estates comprised in a receivership, has been discussed in a former page.

If a solicitor in the cause has received rents, he must pay them over to the Receiver appointed therein; and he will not be permitted to set up a lien on them for his costs.⁴

¹ *Malcolm v. O'Callaghan*, 3 M. & C. 52, 53, 63; 1 Jur. 838; *Id.*; *Bristow v. Needham*, 2 Phil. 190.

² *Re Montgomery* 1 Moll. 419.

³ *Courand v. Hammer*, 9 Brev. 3.

⁴ *Wickens v. Townsend*, 1 R. & M. 361.

The Receiver is entitled to all the rents in arrear at the time of his appointment,¹ and to the rents which subsequently accrue during the continuance of the receivership; and an order may be obtained on motion or summons, with notice to the tenant, for payment thereof by him to the Receiver, notwithstanding he has not attorned.²

After the tenants have attorned to the Receiver, and so created a tenancy as between them,³ the Receiver may also distrain, in his own name, for rent accrued during such tenancy,⁴ without first obtaining an order so to do;⁵ but a distress for rent accrued before that time must be made in the name of the person who has the legal right to the rent;⁶ and if he is a party to the suit, or otherwise bound by the proceedings therein, or if there is any doubt who has the legal right to the rent, an application should be made to the Judge at Chambers for his directions thereon.⁷ It appears also, from *Brandon v. Brandon*,⁸ that the practice is for the Receiver to distrain upon his own discretion for rent in arrear, within the year; but if in arrear for more than a year, then an order is necessary.

It would seem that a first mortgagee has not, as such, a right to the rents and profits of the mortgaged premises. Where, therefore, a puisne incumbrancer filed a bill, and obtained the appointment of a Receiver, who had since his appointment collected the rents and profits of the property, and paid the same into Court, and a prior incumbrancer, who was not a party to the first suit, filed a bill upon his mortgage and moved in that cause for an order to apply the rents so paid in by the Receiver to the payment of his claim the Court, under the circumstances, refused the application with costs, but gave the plaintiff liberty to renew the same in such manner, and in such suit as he should be advised.⁹

1 *Codrington v. Johnstone*, 1 Beav. 524.

2 *Hobson v. Sherwood*, 19 Beav. 676.

3 *Woodfall*, 376; *Evans v. Mathias*, 7 El. & Bl. 590, 601; 3 Jur. N. S. 798, 796; and see *White v. Snale*, 22 Beav. 72; S. C. nom. *White v. James*, 26 Beav. 191; 4 Jur. N. S. 1214.

4 *Woodfall*, 376; *Mitchel v. Duke of Manchester*, 2 Dick, 787.

5 *Woodfall*, 376; *Pitt v. Snowden*, 3 Atk. 760; *Dancer v. Hastings*, 4 Bing. 2; 12 Moore, 34; *Bennett v. Robins*, 5 Car. & P. 379.

6 *Woodfall*, 376; *Pitt v. Snowden*, *ubi sup.*; and see *Shelly v. Pelham*, 1 Dick. 120; *Raincock v. Stimpson*, 120, n.; *Hughes v. Hughes*, 3 Bro. C. C. 87; 1 Ves. J. 161.

7 *Ibid.* As to distresses for rent, see *Add. Cont.* 833; *Dixon*, 194—230; L. C. Conv. 260—266; *Woodfall*, 367—429. 8 5 Madd. 478.

9 *Bank of British North America v. Heaton*, 1 Cham. R. 176.

An application for leave to distrain is made at Chambers, and ordinarily by notice of motion; but it is not usual to draw up a formal order in such cases: the minute made by the Registrar of the directions given been deemed sufficient.¹

In an ordinary case, a Receiver may, in his discretion, let for a year certain or less, or for any term not exceeding three years, without applying for the sanction of the Judge.² He has also an implied authority to determine such tenancies by a regular notice to quit;³ but he ought not to raise their rents, on slight grounds without leave of the Court;⁴ and he cannot bring an ejectment, or take any other step to evict a tenant, without the sanction of the Judge.⁵

Where the Receiver of a Railway Company was appointed to receive "the rents, issues and profits of the Railway" *Held*, that it was his duty to receive the gross receipts of the Company for the carriage of passengers, freights, mails, &c., and to pay the bills for running expenses thereout, and not to receive only the surplus after paying expenses. The order for the receivers appointment should direct the payment to him, of the tolls and profits arising from the Railway.⁶

Where in consequence of the misconduct of a managing partner, a Receiver had been appointed, a motion calling on a person in possession of property of the partnership (the legal estate in which was in such partner to deliver up possession or attorn to the Receiver was granted, though the person in possession swore that the conveyance by which such legal estate became vested, though absolute in form was executed by the deponent as a security only.⁷ In a suit in which a Receiver of partnership effects had been appointed and a sequestration issued against the defendant for contempt, the Court retained a motion against third persons for delivery or payment to the Receiver or sequestrators of a promissory note, the

1 For form of order to distrain in the name of a defendant, see *Seton*, 1013, No. 3.

2 *Shuff v. Holdaway*, M. R. in Chambers, 27 May, 1883.

3 *Woodfall*, 52, and cases there cited. As to notices to quit, see *ib.* 286-308, 308.

4 *Woodfall*, 52. 5 *Wynne v. Lord Newborough*, 1 Ves. J. 164: 3 Bro. C. C. 58.

6 *Simpson v. O. & P. R. R. Co.*, 1 Cham. Rep. 120.

7 *Prentiss v. Brennan*, 2 Grant, 18.

property of the partnership; transferred subsequently to the issuing of the injunction and sequestration, but before the note became due by the defendant in a foreign country, the affidavits as to the *bona fides* of such transfer being contradictory: the Court giving leave to file a bill against such third persons.¹

A Receiver may, with the sanction of the Judge, demise for terms of years;² but, under the present practice, leases of property in the hands of a Receiver are usually directed to be made by the person having the legal estate or power of leasing; and, if necessary, recourse is had to the provisions of the various statutes conferring jurisdiction on the Court to sanction leases. The sanction of the Judge to a lease, or agreement for a lease, of property comprised in a receivership is obtained in the manner before explained in treating of the management of property.³

The Court will not permit a Receiver to lay out more than a small sum at his own discretion. It is improper, therefore, for a Receiver, or a guardian, to do, without the sanction of the Judge, any act which may involve the estate in expense.⁴ Upon this ground, if an ejectment is brought against a Receiver, or an action for anything done by him in the performance of his duty, he should not defend the action without the sanction of the Judge previously obtained; and where the Receiver, without the authority of the Court, defended actions arising out of a distress made by him upon a tenant of the estate, for rent, the Court refused to allow him his costs of the action.⁵

So likewise, although a Receiver may lay out small sums of money in customary repairs, or may allow the same to the tenant, the Court is not in the habit of permitting Receivers to apply the trust funds in repairs, to any considerable extent, without a previous application to the Judge.⁶ Formerly the Court acted strictly upon this rule, and never permitted a Receiver to lay out money on

1 *Prentiss v. Brennan*; *Re Bunker*, 2 Grant, 322.

2 1 *Platt on Leases*, 329; *Woodfall*, 51; see also *Dancer v. Hastings*, 4 Bing. 2; *Neale v. Bealing*, 3 Swanst. 304, n.; *Wynne v. Lord Newborough*, 1 Ves. J. 164; 3 Bro. C. C. 88; *Gibbins v. Howell*, 3 Madd. 499; *Baylies v. Baylies*, 1 Col. 537.

3 *Ante*; and see *Whitehead v. Bennett*, 5 W. R. 419, V. C. K.

4 What is said, *ante*, as to management of property by trustees will apply, in general, as to receivers.

5 *Seaby v. Dickon*, 6 Sm. 629.

6 *Attorney-General v. Vigor*, 11 Ves. 563; and see *Blunt v. Clitherow*, 6 Ves. 799; *Thornhill v. Thornhill*, 14 Sm. 600. As a general rule, the amount should not exceed 30l. a year. Where the amount proposed to be expended by the receiver is small, the sanction of the Judge will be given on production of a letter from the receiver, stating the propriety of the intended expenditure, and the maximum amount to be laid out.

the estate without a previous order; but now, where the Receiver has laid out money, in repairs or otherwise, without such previous order, he may be allowed the money so laid out, if it is found to have been beneficial to the estate;¹ and where he has defended an action successfully, he may be allowed his costs, although he had not obtained the previous sanction of the Court.²

Where a Receiver had made an investment unauthorized by the Court, by which a profit had been made, the amount realized was directed to be added to the principal.³ Mowat, V.C., said that the investment was not one which strictly a Receiver should have made, that the principal was risked, and any profit so made should be added to the principal and treated as such.

When a Receiver is appointed to get in outstanding personal property, it is his duty to collect all that he can get at: to enable him to do which, the order, under which his appointment is made, usually directs the parties to deliver up to him all securities in their possession for such property, together with all books and papers relating thereto.⁴ If the parties in whose hands such securities or papers are refused to deliver them up, the Receiver should give notice of such refusal to the party conducting the proceedings: to the intent that he may take the necessary steps for enforcing the order. If the persons indebted to the estate refuse to pay the amounts due from them, the sanction of the Judge must be obtained to the Receiver putting the same in suit.⁵

The power to bring suits on the permission of the Master being obtained is sometimes omitted in the order under which a Receiver is appointed. In such a case the Master has no authority to grant this leave, and the proper course is to apply in Chambers. Where a Receiver appointed to manage an estate finds it necessary to sue for debts due to it, an application for permission to do so must be made, supported by affidavits showing the expediency of institut-

1 *Tempest v. Ord*, 2 Mer. 55; and see *Morris v. Elms*, 1 Ves. J. 189; *Blunt v. Clitheroes*, 6 Ves. 709, and *Attorney-General v. Vigor*, 11 Ves. 563.

2 *Bristowe v. Needham*, 2 Phill. 190.

3 *Baldwin v. Crawford*, 2 Cham. Rep. 2.

4 See form of order, *Seton*, 1002, No. 1, *ante*.

5 See *Seton*, 1013, 1081; and *Wood v. Hitchings*, 2 Benv. 289, 294: 4 Jur. 858.

ing such proceeding.¹ It is a rule of the Court, well established, and one which is essential for the due protection of its officers, that no action shall be allowed to be prosecuted against a Receiver, or those in possession under him, without the leave of the Court.²

Where the order directs that the Receiver shall keep down the interest of incumbrances, or make any other payments, he must, of course, comply with that order; and the sums so paid by him will be allowed him in his account. He must, however, take proper receipts from the persons to whom he makes such payments;³ and it must be remembered that, in passing his accounts, the Receiver will be subject to the rules to which all other accounting parties are subject;⁴ and he will only be allowed to discharge himself by affidavit as to those payments which are under forty shillings: for all other payments, he must produce proper vouchers.

A Receiver will be responsible for any loss which may be occasioned to the estate from his wilful default: therefore, if he places money received by him in what he knew to be improper hands, the Court will oblige him to pay it out of his own pocket.⁵ But if he deposits the moneys with a banker for safe custody, he will not be answerable for the failure of the banker if the moneys are not mixed with his own moneys, and they were *bona fide* deposited for safe custody, under circumstances in which they could not properly have been paid into Court.⁶

A receiver, however, will be held answerable for the loss occasioned by the failure of a banker with whom he deposited moneys for security, if the deposits are made in such a way that he parts with the absolute control over the fund. Therefore, in the case last cited, where a Receiver paid the sums which he had received into a banking-house to the joint-account of his sureties, under an arrangement with them that all drafts for the sum so paid in should be written by one of the sureties and signed by himself, it was held by Lord Brougham, and afterwards by the House of Lords upon

¹ *Thomas v. Torrance*, 1 Cham. Rep. 9.

² *Per Strong, V.C.*, in *Coleman v. Glanville*, 18 Grant, 43.

³ As to the receiver's liability to an incumbrancer, in case he allows an improper party to receive rents, see *Gurden v. Badcock*, 6 Beav. 187.

⁴ *Knigh v. Lord Plymouth*, 3 Atk. 489: 1 Dick. 120; but see 2 R. & M. 219; see also *Routh v. Howell*, 3 Ves. 665.

⁶ *Salway v. Salway*, 4 Russ. 60; 2 R. & M. 215; S. C. nom. *White v. Brough*, 9 Bl. N. S. 151; 3 Cl. & F. 44.

appeal, that the Receiver was liable to the loss occasioned by the failure of the banking-house.¹

The case will be the same, if the Receiver deposits the money with, or remits it to, a banker for his own credit and use, and not to a separate account for the trust, and the banker afterwards fails;² or where, although he has deposited the amount to a separate account, he has been in default in passing his accounts.³

A Receiver is not, in general, justified in making any application himself to the Court. If, in the course of the proceedings, it should become necessary to take the directions of the Judge, the Receiver should apply to the party conducting the proceedings to make the necessary application; and in the event of his refusal, the Receiver may himself apply.⁴

Applications, with reference to the property under the management of a Receiver, are usually made by motion at Chambers;⁵ but where the application is made by a person not a party to the suit, with reference to landed property, it has been made by petition.⁶

Receivers' Accounts.

A Receiver must leave his accounts at the Master's office, on the days appointed for that purpose by the Master's warrant.

In the first account the Receiver passes he should state, in the column for observations, how each tenant holds; and every alteration should be noticed in the subsequent accounts: in this column should also be entered any remarks the Receiver may think proper to make as to the arrears of rent, the state of repairs, or otherwise.⁷ If the account is drawn in an irregular manner, the Receiver may be ordered to draw it up in proper form, and to pay the costs occasioned by his irregularity.⁸

1 *Salway v. Salway*, 2 R. & M. 715; Affd. nom. *White v. Baugh*, 9 Bl. N. S. 181: 3 D. & F. 44.

2 *Wren v. Kirton*, 11 Ves. 377.

3 *Drever v. Maudesley*, 8 Jur. 547, L. C.; 7 Jur. 8, V. C. R.; and see *Wilkinson v. Bewick*, 4 Jur. N. S. 1010, M. R.

4 *Ireland v. Eade*, 7 Beav. 65; *Parker v. Dunn*, 8 Beav. 497.

5 See *Seton*, 1017.

6 *Richards v. Richards*, Johns. 265.

7 *Bloxam*, 61.

8 See *Bertie v. Lord Abington*, 8 Beav. 68, 60.

Upon leaving the account, a warrant to proceed thereon is taken out by the Receiver's solicitor, and served upon such parties as are entitled to attend the passing of the accounts. If the Receiver neglects to take out this warrant, any of the parties may do so.

Upon the return of the warrant, the parties attend at the Master's office and the account is substantiated in the manner before described.¹

The Receiver also brings in his bill of costs upon passing the account: which is then taxed, and the amount included in his disbursements. Parties attending the passing of a Receiver's account only have costs from the Receiver after a decree disposing of the costs of the suit, and showing who is entitled to costs out of the rents: in other cases, the costs of the parties are costs in the cause. Where the parties are entitled to have their costs paid by the Receiver, such costs are taxed by the Master, and paid by the Receiver and included in his account.³

If the Receiver does not attend and substantiate his account, he may be charged with the amount of his receipts, but may be disallowed such of his payment as he has failed to vouch.

When the accounts are passed and the costs revised, the Master prepares his report, which is settled, signed, filed, and confirmed as other reports are.

Although a Receiver is only bound by his recognizance to pass his accounts at the periods appointed by the order, he may, at any time, apply to the Court to pay in monies in his hands; and if, in the interval between passing his accounts, he receives sums of such an amount as to make it worth while to lay them out, he ought to pay them into Court: in order that they may be made productive for the benefit of the estate.⁴ Where the order for appointing a Receiver does not provide for the payment of his balances into the bank, the Receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under

¹ *Ante*.

² *Blorum*, 52.

³ For a scale of such costs, see Regul. 8 Ang. 1857, Sched. No. 15.

⁴ *Shaw v. Rhodes*, 2 Russ. 539.

a pretence of waiting for some party in the cause to obtain an order upon him for payment. He ought to pay it into Court; and, unless he does so, the Court will charge him with interest.¹

A Receiver may be directed to pass his accounts and pay over the balance, although the bill has been dismissed,² or the proceedings ordered to be stayed.³

If the Receiver does not leave his account, or pay in the balance found due from him, at the appointed times, any party interested in the account may apply that he may leave his account or pay in the balance, within a limited time (usually four days), after service upon him of the order to be made, and pay the costs of the application.⁴ The notice of motion must be served on the Receiver; and if he does not appear, the order will be made, on production of an affidavit of service of the notice, or, where the default consists in not making a payment into Court, of the order and certificate under which such payment is to be made; and the Registrar's certificate of such default must be produced in support of the application. The order is drawn up by the Registrar;⁵ and a copy of the order must be served personally upon the Receiver;⁶ or if personal service of the order cannot be effected, an order giving leave to substitute service should be obtained at Chambers, or an *ex parte* application by motion supported by affidavit;⁷ and the order must be served in conformity with the directions thereby given. If, after such original or substituted service, the Receiver neglects to obey the order, it may be enforced against him by attachment and other process of contempt.⁸ A similar course should be pursued against a Receiver who is directed to pay his balance to the parties, instead of into Court, and neglects to do so; but it is irregular to issue a writ of *fieri facias* against him for such balance.⁹

¹ See *Potts v. Leighton*, 16 Ves. 278, 274.

² *Pitt v. Bonner*, 5 Sim. 577; and see *Hutton v. Beaton*, 9 Jur. N. S. 1839, V. C. R.

³ *Paynter v. Carew*, Kay, App. 36, 44.

⁴ For form of order, see *Seton*, 1018, No. 1.

5 *Ante*.

6 *Ante*.

⁷ As to substituted service, see *ante*.

⁸ See *ante*, *Seton*, 1020.

⁹ *Whitehead v. Lynes*, 34 Beav. 161; 11 Jur. N. S. 74; *Affd.* on this point, 12 L. T. N. S. 322, L. C. Westbury. Since this case it has been doubted, at the Record and Writ Clerks Office, whether an attachment can be issued against a receiver; and whether the proper remedy against his person is not by an order for his commitment, on notice, under the former practice: as to which, see 1 *Turn. & Ven.* 470; and see *Macarty v. Gibson*, Mos. 49; *Davies v. Cruikshank*, 14 Ves. 143; *Scott v. Platel*, 2 Phill. 229.

Where a Receiver neglects to leave or pass his account, and pay the balances thereof at the times fixed by the order, or by the Master for the purpose, the Master before whom such Receiver has to account will from time to time, when his subsequent accounts are produced to be examined and passed, not only disallow the salary therein claimed by such Receiver, but also charge him with interest, after the rate of 5*l.* per cent. per annum, upon the balances so neglected to be paid by him, during the time the same shall appear to have remained in his hands.¹

The Receiver is charged with interest: not upon each sum from the amount at which it came into his hands, but in the same manner that an executor is charged with interest; that is, by making yearly or half-yearly rests in the account.² And it appears that this rule will be applied, as well as in cases where the Receiver has been discharged, as where he is still in office. Therefore, where a Receiver, who had been discharged, had not paid in his balance, he was ordered to pay in the same, and also the amount allowed for his salary, together with interest on both sums, at 5 per cent., from the day appointed, and to pay the costs of the application;³ but where the default was made by the executors of a deceased Receiver, the sureties were only ordered to pay interest at the rate of 4*l.* per cent.⁴

A Receiver may be charged with interest on money improperly kept in his hands, although he has passed his account, and all parties have expressed themselves satisfied; and for this purpose, an inquiry what money he has received from time to time, and how long he has kept it in his hands, may be directed;⁵ and in—*v. Jolland*,⁶ Lord Eldon appeared to think, that if such a case should be brought before him, he should direct a Receiver to make good any loss which might be occasioned from a difference in the price of the funds, between the time when the Receiver's balances were paid in, and the time when they ought to have been paid in.

¹ Ord. of 1792, r. 16; *Bristowe v. Needham*, 9 Jur. N. S. 1168; 11 W. R. 936, V. C. K.; and see *Fletcher v. Dodd*, 1 Ves. J. 85; *Ward v. Swift*, 8 Hare, 139.

² *Potts v. Leighton*, 15 Ves. 273; see also *Fletcher v. Dodd*, 1 Ves. J. 85; ——— *v. Jolland*, 8 Ves. 72.

³ *Harrison v. Boydell*, 6 Sim. 211.

⁴ *Clements v. Beresford*, 10 Jur. 771, V. C. K. B.; and see *Dawson v. Raynes*, 2 Russ. 466.

⁵ *Fletcher v. Dodd*, 1 Ves. J. 85.

⁶ 8 Ves. 72, 73. The name of this case is *Frotherstone v. Jolland*.

In *Hicks v. Hicks*,¹ where a Receiver had been appointed during the minority of an infant, who had no guardian, and was directed to place out the surplus of the rents and profits, when they should amount to a competent sum, with the approbation of the Master, on government or other securities, but admitted so to do, Lord Hardwicke directed that he should pay interest at the rate of four per cent. on the surplus rents and profits, from the date of the decree till the infant came of age: although the infant, two days after he came of age, settled accounts with the Receiver, who delivered up his vouchers, and gave him copies of all the accounts passed by the Master.

In case of default by any Receiver in leaving or passing any account, or in making any payment, he may be required to attend at Chambers, at a time to be appointed for that purpose, to show cause why such account has not been left or passed, or payment made; and thereupon such directions may be given at Chambers, or by adjournment in open Court, as shall be proper to ensure the prosecution thereof by some person interested therein, and for the discharge of the Receiver and appointment of another, and for payment of the costs incurred by any neglect or default; or a certificate by the Registrar of such neglect or default, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed, without any fee being payable thereon; and after such certificate has been so made, unless the same is discharged, none of the parties are to be at liberty to further prosecute the proceeding at Chambers, unless and until the Court or Judge shall, upon application, make an order directing the same to be prosecuted; and upon such certificate becoming binding, any party may apply to the Court, and the Court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made, or proceeding taken, which shall not have been duly prosecuted, or otherwise, as may be thought proper.²

The Court has no jurisdiction, on the death of a Receiver, to order, in a summary way, that his executors shall bring in and pass his accounts, and pay the balance found due from him out of

1 3 Atk. 274.

2 Ord. of 1823; see also *ante*.

his assets.¹ The proper course, in such a case, if the recognizance cannot be put in suit, is to file a bill against his personal representatives for an account. This course may, however, be avoided, if the representatives will obtain or consent to an order to pass his accounts, and to pay the balance. Such order may be obtained at Chambers, on motion;² and where, on the executors' application, liberty had been given them to pass the accounts, and pay in the balance, they were not allowed, after the lapse of many years, to object to the order on the ground of want of assets.³

Where the Receiver's recognizance is to be put in suit, an order must first be obtained to authorize the proceeding. This order is usually obtained on motion: which must be served on the Receiver, and on the sureties also if they are to be proceeded against.⁴ The amount due from the Receiver must also have been ascertained, unless the application is for leave to put the recognizance in suit against the Receiver's representatives, or his sureties, or, as it seems the Receiver has absconded.⁵

An order for leave to put the recognizance in suit having been obtained, the next step is to proceed by *scire facias* in the names of the Master, or other cognisee named in the recognizance, or the survivor of them, or his executors or administrators,⁶ against the cognisors therein named, or any of them, or their respective heirs executors, or administrators.⁷

A *scire facias* is a judicial writ, founded upon some record, and requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such record: it is considered in law as an action; and should be used out of the Court in which the record is supposed to remain.⁸

In *Walker v. Wild*,⁹ where a Receiver absconded, and his recognizance had been estreated, and an action brought against the

1 *Jenkins v. Brient*, 7 Sim. 171; *Ludgater v. Channell*, 15 Sim. 479; 11 Jur. 273; 3 McN. & G. 175.

2 For form of order, see *Seton*, 1022.

3 *Gurden v. Badcock*, 6 Beav. 157, 159.

4 For form of order, see *Seton*, 1018, No. 3.

5 *Ludgater v. Channell*, 15 Sim. 479, 483; 11 Jur. 273; 3 McN. & G. 175, 180.

6 As to the course where the cognisees are dead, see *Seton*, 1019. For form of order to put recognizance in suit, in the names of the executors of a deceased Master of the Rolls, upon the petitioner's recognizance to indemnify his estate, see *Blair v. Toppitt*, cited *Seton*, 1012.

7 At Common Law, though a recognizance is against two, a writ of *scire facias* may be issued against one, because the recognizance is joint and several: *Chitty's Arch.* 1132.

8 *Ibid.* 1130, 1131.

9 1 Madd. 528.

sureties, one of them obtained an order for a reference to see what was due from the Receiver, and for payment by the applicant of the amount (not exceeding the penalty,) by instalments into Court, and for a stay of proceedings in the mean time; the applicant paying the cost of the motion, and of the subsequent proceedings in consequence of it.

In any proceeding at Law upon the recognizance, the penalty of the recognizance is the debt for which execution will be issued.¹ The Receiver, therefore, or his sureties, if they wish to avoid the consequences of the forfeiture of the recognizance, must apply to the Court to stay the proceedings upon payment of the amount actually due.² It seems, from the judgment of Lord Eldon, in *Dawson v. Raynes*,³ that the sureties will not be relieved from the effect of the recognizance, unless they pay in all that the Receiver himself could have been required to pay. In that case, the Vice-Chancellor was of opinion that the sureties were not liable to pay the interest on the Receiver's balance: which the Receiver had been ordered to pay; but Lord Eldon, upon appeal, held the general rule to be that, where the principal debtor is obliged to pay interest, there can be no equity that the surety should not pay the interest, in default of the principal. Under the peculiar circumstances of the case, however: the Receiver having been bankrupt, with the knowledge of all parties, for a considerable length of time, during which no steps were taken to compel the passing of his accounts: his Lordship affirmed the Vice-Chancellor's order.

Where a bill of exchange given by a Receiver to a creditor, who had supplied goods for the estate, was dishonoured, the creditor was ordered to be paid out of a fund applicable to pay the balance due to the Receiver.⁴

Discharge of a Receiver.

When a Receiver has been appointed, and has given security, he cannot be discharged upon his own application, without showing some reasonable cause why he should put the parties to the expense of a change. Where a Receiver applied to be discharged on the

¹ See the certificate of the Court of K. B., in *Dawson v. Raynes*, 2 Russ. 468.

² See *Walker v. Wild*, 1 Madd. 528.

³ 2 Russ. 466, 471.

⁴ *Tempest v. Ord*, 1 Madd. 80.

ground of ill-health, he was not only ordered to be discharged and his recognizance vacated, on passing his accounts, but he was allowed, although this part of the application was opposed, to retain his costs "of the application, and incidental thereto," out of the balance in his hands.¹

A Receiver is generally continued till the decree; but if the right of the plaintiff ceases before that time, the Receiver may be discharged, and cannot be continued at the instance of a defendant. Upon this ground, Lord Eldon determined, in *Davis v. Duke of Marlborough*, that where the plaintiff had been satisfied by the payment of his demand, the order for the Receiver must be discharged: although the discharge was opposed by two creditors having prior annuities to the plaintiff's. His Lordship observed: "I apprehend that with the right of the plaintiff to have the Receiver, must fall the rights of other parties. It would be most extraordinary, if, because a Receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a Receiver appointed on his behalf."²

A Receiver, being appointed for the benefit of all parties, will not be discharged on the *ex parte* application of the party at whose instance he was appointed,³ nor, where appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one.⁴

If, during the course of the proceedings, the continuance of a Receiver becomes unnecessary, he will be discharged. Thus, upon new trustees being appointed in a suit, a Receiver was, on the application of the plaintiff, which was opposed by some of the defendants, who were beneficially interested in the property as legatees, ordered to be discharged, upon the new trustees undertaking, without entering into recognizances to account half-yearly, in the same way as the Receiver.⁵

Where the Receiver becomes bankrupt, he will be discharged, and a new Receiver appointed.

¹ *Richardson v. Ward*, 6 Madd. 266.

² *Swan v. t.* 167, 168; but see *ib.* 118; *Largan v. Bowen*, 1 Sch. & Lef. 296.

³ *Ibid.*; *Davis v. Duke of Marlborough*, 2 Swanst. 106, 118; *Bainbrigg v. Blair*, 3 Beav. 421, 423.

⁴ *Smith v. Lyster*, 4 Beav. 227, 229.

⁵ *Bainbrigg v. Blair*, 3 Beav. 421, 423.

The appointment of a Receiver, made previous to a decree, will be superseded by it, unless the Receiver is expressly continued.¹

The application to discharge a Receiver may be made by petition, or motion.²

The petition, or notice of the motion, should be served on all the parties; but the Receiver, though served, is not entitled to appear at the hearing of the application.³ The direction for the discharge of the Receiver may also be given in the decree at the hearing, or upon further consideration.⁴

If the Receiver has not passed his final account, and paid over the balance found due from him, the order directs him so to do; and if he has given a recognisance, it directs the recognisance to be vacated on his passing his final account, and paying the balance found due from him, if that has not already been done.⁵

Where a recognisance is directed to be vacated, the order must be taken, together with an office copy of the Master's report, and the Registrar's certificate of payment of the balance into Court, or an office copy of an affidavit of payment of the balance of the person entitled to it, where the order directs such payment,⁶ to a Judge, who, if the evidence of payment is satisfactory, makes a note of it, and marks the order with his initials. The order must then be taken to the Office where the recognisance is filed; and the recognisance will be marked as vacated. If the recognisance is not duly vacated, and a material error is afterwards discovered in the Receiver's account, the money may be recovered.⁷

Where a Receiver is entitled to his discharge, he is also entitled to the costs of it.⁸

A Receiver had been appointed to collect the gross amount of the tolls, rents, issues, and profits of the O. & P. R. Co. After-

1 See form of order, *Seton*, 1008, No. 6.

2 By consent of all parties, an application to vacate a Receiver's recognisance may be made by petition of course.

3 *Herman v. Dunbar*, 23 Beav. 212.

4 *Seton*, 1023.

5 For form of order, see *Seton*, 1021.

6 *Seton*, 1023.

7 1 Turn. & Ven. 471.

8 *Richardson v. Ward*, 6 Madd. 266.

wards the rolling stock of the company had been seized by a sheriff under *fi. fa.* at the suit of another company not a party to the suit, the sheriff declined to sell the same unless authorized by the Receiver, who believing under the advice of counsel, that he had no control over the stock assented to the sale by the sheriff, and the same was accordingly sold. *Held*, on motion to remove the Receiver for misconduct that he had committed a breach of duty in not informing the Court of the seizure and threatened sale, and in assenting to the sale without its sanction, but as it appeared that the Receiver had acted *bona fide*, and to the best of his judgment for the benefit of all parties, the Court declined to remove him from his office, but ordered him to pay the costs of the application.¹

A Receiver, being appointed for the benefit of all parties to a cause, he should, on moving to vacate his recognizance give notice to all parties.²

Liabilities and Rights of Sureties.

The sureties of a Receiver cannot be discharged at their own request. Where, therefore, an application was made to discharge a Receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held, that no regard was to be paid to their application, unless it was for the benefit of the parties in the cause, or something of that kind: "for, if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed: for then there would be no end of it."³

But although the general rule is not to discharge the surety of a Receiver on his own application, during the continuance of the receivership, such rule will yield to circumstances: "as where underhand practice is proved, and the person secured shown to be connected with such practice";⁴ and where a surety does procure his discharge, during the continuance of the receivership, the Receiver must enter into a fresh recognizance, with new sureties.⁵

¹ *Simpson v. O. & P. R. Co.*, 1 Cham. R. 587.

² *Brown v. Perry*, 1 Cham. R. 253.

³ *Griffith v. Griffith*, 2 Ves. 8. 400.

⁴ *Hamilton v. Brewster*, 2 Moll. 407; *Griffith v. Griffith*, 2 Ves. 8. 400.

⁵ See *Vaughan v. Vaughan*, 1 Dick. 93; *Blain v. Betts*, *ib.* 336.

Where a surety becomes bankrupt, the Receiver is usually required to enter into a new recognisance, with two or more solvent sureties : the order is made on motion.

In *Shuff v. Holdaway*,¹ an order was made, on the application of the surety, directing the Receiver's accounts to that time to be passed, and that on payment by the Receiver, or by the applicant, of the certified balance (not exceeding the penalty,) into Court, the applicant should be discharged as surety, and be at liberty to apply to have the recognisance vacated as to him ; and that the applicant should be at liberty to attend the taking of the account ; but he was ordered to pay the costs of the application.

The surety's liability extends to all that the Receiver would have been required to pay, including the costs of appointing a new Receiver.² This point came before Lord Eldon, upon the question whether the sureties of a Receiver were liable to pay interest upon the balance in a Receiver's hand, when he became bankrupt, and his Lordship said : " It seems to me that it would be difficult to say that, where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal. The penalty is forfeited by the breach of the condition ; the amount of the penalty is the debt due from the sureties at Law. How can they have a right to be discharged, in this Court, from their legal liability till they have paid all that the principal could have been required to pay ? " ³

This rule, however, is capable of relaxation where the circumstances of the case will warrant it : accordingly, as the Receiver, in the case referred to, had been bankrupt with the knowledge of all parties for a considerable time, and no steps had been taken to compel the passing his accounts, Lord Eldon refused to make the sureties pay interest.⁴

It seems that, where a Receiver has become bankrupt, and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the Receiver's account ;⁵ and so, where the Receiver had died insolvent

¹ V. C. W., in Chambers, for M. R., 8 Sept., 1857, Reg. Lib. B. 1747.

² *Maunsell v. Egan*, 3 J. & Lat. 251.

⁴ *Ibid.*

³ *Darson v. Raynes*, 2 Russ. 408, 471.

⁵ *Ibid.* 467.

circumstances, and his personal representative had consented to his final account being taken in the suit in which he was appointed, liberty was given him to attend.¹

Where an action is brought against a Receiver's surety upon the recognisance, the proper course for him to pursue appears to be, to apply to the Court, by motion, with notice to the parties interested in the suit, to stay the proceedings on the recognisance : offering, at the same time, to pay the amount due from the Receiver, but not exceeding the penalty of the recognisance, into Court. The surety must, in addition, pay the costs of the application, and of the proceedings consequent upon it.² If the Receiver's account has not been taken, the application should also pray an inquiry what is due from the Receiver. It seems that, upon an application of this kind, the Court may indulge the surety by allowing him to pay the balance in by instalments.³

When a surety is called upon to pay anything on account of the Receiver, he will be entitled to stand in the place of the Receiver for anything which may be coming to him in the suit. Therefore, where the Receiver had borrowed money from his surety, to enable him to make necessary payments, Lord Eldon decided that the surety was entitled to be repaid the amount lent, out of the balance in Court reported due to the Receiver.⁴ Upon the same principle, the share of the Receiver in property which was being administered by the Court, was held liable to make good to the surety the amount paid by him for the Receiver : although it was excepted from a mortgage which the Receiver had given the surety as an indemnity.⁵

Managers and Consignees.

Where a Receiver is required for the purpose, not only of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade or business, he is usually denominated "Manager," or "a Receiver and Manager."

¹ *Simmons v. Ross*, M. R. in Chambers, 20 Nov. 1860.

² *Walker v. Wild*, 1 Madd. 528 ; and see *Mann v. Stennett*, 3 Beav. 189, where it was held, that payment by the surety to the solicitor conducting the proceedings was insufficient.

³ *Walker v. Wild*, 1 Madd. 528.

⁴ *Glossop v. Harrison*, 3 V. & B. 135 : G. Coop. 61.

⁵ *Brandon v. Brandon*, 3 De G. & J. 524 : 5 Jur. N. S. 256.

The most usual cases in which managers are appointed are those in which partnership trades are to be carried on, or which relate to mines or collieries. The ground upon which the Court usually acts in making appointments in such cases, have been already pointed out.¹

A Manager will not be appointed in mining concerns at the instance of a plaintiff, not having the legal interest, who, after standing by and suffering the defendant to incur great expense and risk, comes forward, upon the concern turning out profitable, and claims an interest.²

Where the suit relates to property abroad, which partakes of the nature of a trade, it is also usual to appoint managers; and if the manager must necessarily be resident there, it is usual to add to the order, directing the appointment of a manager, an order for the appointment of one or more consignee or consignees resident in this country, to whom the produce of the property in question may be remitted, and by whom it may be disposed of.³

The course of proceeding, under an order for the appointment of a manager and consignee, is the same as that under an order for the appointment of a Receiver;⁴ and the General Orders of the Court which apply to receivers, apply to managers and consignees also.

In some cases, a manager has been appointed of a West India estate, without giving any security whatever;⁵ but in *Rutherford v. Wilkinson*,⁶ Lord Gifford, M. R., stated that it had only been done under special circumstances; and that in general, to warrant such a course, it should appear, by the report, that no manager could be found who would give security, or that the proposed person was fit to be appointed without security. Under the circumstances of that case, however, his Lordship made the order for the appointment to be without security, with the consent of such of the parties as were capable of consenting; but on a subsequent application in the same cause, security was required.⁷

1 *Ante*, and see *Jefferys v. Smith*, 1 J. & W. 298, 302.

2 *Norway v. Rowe*, 19 Ves. 144, 159; and see *Rowe v. Wood*, 2 J. & W. 553.

3 See *Seton*, 1035, *et seq.* As to the appointment of receivers and managers of property abroad, see *ante*; see also *Morris v. Elme*, 1 Ves. J. 139; *Morison v. Morison*, 7 De G. M. & G. 214.

1 Jur. N. S. 1100; 2 Sm. & G. 564; 1 Jur. N. S. 339; *Re Tharp*, 2 Sm. & G. 578, n.

4 *Ante*.

5 *Seton*, 1038.

6 *Seton*, 1036, 1038.

7 *Ibid*.

The Court, in dealing with property in a colony, has provided against the inconvenience likely to arise from the death, absence, or incapacity of the manager in existence, or appointed by the Court, by appointing another manager to act in such event.¹

Consignees appointed by the Court, in an administration suit, have a charge on the property, for payments sanctioned by the Court, in priority to incumbrances created before the suit; and will be allowed interest on the balance due to them.²

A receiver and manager of a West India estate, who has been appointed at the instance of a mortgagee, is not entitled to the produce of the estate which has been shipped to the mortgagor's consignees prior to his appointment: although there had been no conversion prior to that time.³

A manager of a West India estate is entitled to a commission on the produce sold or remitted, so long as he is resident in the island and personally acting; if he is absent, he is not entitled to the commission himself, but he may be allowed such sums as he has paid to others for the management of the estate during his absence, provided the payments are reasonable.⁴

¹ *Rutherford v. Wilkinson*, Seton, 1038.

² *Morrison v. Morrison*, 7 De G. M. & G. 214; 1 Jur. N. S. 1100; 2 Sm. & G. 564; 1 Jur. N. S. 339.

³ *Codrington v. Johnstone*, 1 Beav. 520, 524.

⁴ *Forrest v. Elwes* 2 Mer. 68; *Seton*, 1087; and see *Chambers v. Goldwin*, cited 2 Mer. 69.

CHAPTER XLI.

SALE OF INFANT'S ESTATES, UNDER 12 VICTORIA, CHAPTER 72.

This Statute, with 13 and 14 Vic., ch. 50, sec. 8, gave to the Court a power by which it is enabled to administer the estates of infants with speed and economy. The Act is embodied in the Con. Statutes of U. C., ch. 12, sections 50 to 57, inclusive, and in the proceedings it was necessary, under Order 87 of the Orders of June, 1853, to entitle the petition, both in the matter of the Infant "*and in the matter of the 12 Victoria, chapter 72.*" Order 527 directs that "A petition for the sale or other disposition of the real estate of an infant is to be entitled in the matter of the infant."

Order 528 provides that "The petition is to be presented in the name of the infant, by his guardian, or by a person applying by the same petition to be appointed guardian as hereinafter provided;" and Order 529, that "The petition is to state the nature and amount of the personal property to which the infant is entitled—the necessity of resorting to the real estate—its nature, value and the annual profits thereof. It must also state circumstances sufficient to justify the sale or other disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that purpose, and for the appropriation of the proceeds. If an allowance for the maintenance is desired, it must be so prayed, and a case must be stated to justify such an order, and to regulate the amount." The Court will not direct a sale of the real estate of an infant merely because the ancestor was indebted; it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit.¹

¹ *Re Boddy*, 4 Grant, 144.

In applying for the sale of real estate settled upon infants, the mother, by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life interest vested in her under the settlement.¹

In directing the sale of infants' real estate, the Court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The Court will order a sale of a portion of an infant's estate to save the rest when it is made to appear for the benefit of the infant.²

Where property was devised by a testator to his widow for the maintenance and raising of his family, until the coming of age of the youngest child, and then to R. one of his sons, charged with certain payments, at intervals, to the widow and other children, with a provision for the substitution of another son in the event of R. dying under age or without issue: *Held*, 1st. That the Court had no jurisdiction to order a sale or mortgage of such property; the Court having no power under 12 Vic., ch. 72, to dispose of the real estate of infants against the provisions of any last will, by which such estate was devised to such infants. 2nd. That such property was not the real estate of the infants within the meaning of the Act.³

All applications under 12 Vic., ch. 72, for the sale of infants' estate must come on before the same judge.⁴ This Court will not allow to a relative of an infant, money expended by such relative in past maintenance of the infant, out of the proceeds of land of the infant sold in lieu of a partition under Con. Stat. U. C., ch. 86.⁵

Order 530 provides that "The petition may pray for the appointment of a guardian, as well as for the disposal of the infant's estate. In that case, a proper case must be made by the petition, and established by the evidence for the appointment of the person proposed;" and Order 531, that, "Upon all petitions for the sale of an infant's estate, the infant is to be produced before a Judge in Chambers, or before a Master." Order 532 provides that, "Where

¹ *Re Kennedy*, 1 Cham. Rep. 97.

² *Re Callcott*, 1 Cham. Rep. 182.

³ *Kellar v. Tucke*, 1 Cham. Rep. 388.

⁴ *Re McDonald*, 1 Cham. Rep. 97.

⁵ *Re Hansell*, 1 Cham. Rep. 388.

the infant is above the age of seven years he is to be examined, apart, by the Judge or Master, upon the matter of the petition, and as to his consent thereto, as required by the Statute; and his examination is to be stated to have been taken under this order, and is to be annexed to and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the Judge or Master before whom he is produced;" and Order 533, that "The witnesses to verify the petition are also to be produced before the Judge or Master, and are to be examined *viva voce* to the matter of the petition, and the depositions so taken are to be stated to have been taken under this order." Order 534, that, "The Masters of the Court are authorized to examine infants and witnesses under the preceding order, without special order or reference." Order 535, that, "Upon a petition so verified, the Court may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case require."

The practice under the Statute is rendered very simple by these orders. The petition being prepared in accordance with the order, an appointment is obtained from the Master verbally (for there is no one to be served), for the examination of the infants and witnesses. At the time appointed, the Master proceeds to take the evidence of the witnesses produced to verify the statements made in the petition. In the case of witnesses, the Master states in a brief certificate in the depositions inserted immediately after the style of the petition, that they are taken under Order 533 of the Consolidated General Orders of June 1868. The practitioner should by these witnesses verify every statement of the petition. The Master also examines the infant, and this must be done apart from other persons. The object of this provision is to free the infant from all influence—the presence even, of a parent, guardian, or other person who might sway his statement, and the Master should explain to him fully the object of the proceeding, and its probable effect on his interests. He should also ascertain that he gives his consent freely to the proposed sale, and that he has not been tutored into a consent. Where, however, the infant is under seven years of age, it is presumed that it is useless to examine one of such tender years, and the Master merely certifies to the fact of the age, and

does not examine him. The examination of the infant is not taken under oath, but the Master certifies that it is taken under Order 532 of the Con. Gen. Orders. The examination and depositions are then annexed to the petition, and given to the solicitor, who moves on them in Chambers *ex parte*. If an order is obtained it is sometimes referred to a Master to conduct the sale, and if there be any special enquiries, the order is worked in his office in the usual way. Whether or not the report requires confirmation, will depend on the nature of the enquiries.¹ It is, however, the practice now, where the estate of infants is of small value, in order to save the expenses of a sale by auction, to direct an advertisement to be inserted in a newspaper, asking tenders addressed to the Registrar to be made for the property.²

¹ See *ante*, and *Re Yaggie*, 1 Cham. Rep. 163.

² *Re Hansell*, 1 Cham. Rep. 139.

CHAPTER XLII.

APPOINTMENT OF NEW TRUSTEES.

When it is referred to the Master to appoint a new trustee in the room of a trustee who is dead, or declining to act, the course to be pursued is for the party obtaining the reference to leave in the Master's office a copy of the order on which a warrant is issued, underwritten, "*To appoint A. B., of, yeoman, trustee under the order made in this cause, dated*" This is served on all the parties interested, and on its return, *vivâ voce* evidence is given of the nature of the property to be entrusted to the proposed trustee, and of his fitness for the office. Any party interested may oppose the appointment, and show, of course by proper evidence before the Master, that the person nominated is not such a person as should receive the appointment, or counter proposals may be made, as in the case of a receiver.

If a counter proposal be made, the practice will be precisely the same as has been described when a receiver is to be appointed—with this difference, that, unless specially ordered by the decree, no sureties for a trustee are required.

At the time the warrant is taken out, the party prosecuting the reference should file an agreement by the proposed trustee to accept the appointment in case he be approved of by the Master. It is important that this be done, as it has sometimes happened that after the expense of a reference had been incurred, the person proposed declined to act. After hearing the evidence, the Master decides as to the propriety of the appointment, and if he thinks it proper, he certifies to that effect. It usually happens that the directions for the appointment of a new trustee is part of a decree containing other directions or enquiries; the Master may, in such a case, cer-

tify the appointment in the general report—but he may, if it be desired, certify separately, and this certificate is considered as a report.

This report is filed, and may be appealed from in the same manner as other reports of a similar nature, but, upon the appeal, the Court will not enter into the comparative merits of the several persons who have been proposed by the different parties.¹ It frequently happens that the order directing the appointment of new trustees, directs a conveyance of the trust estates to such new trustees, to be executed, and orders the Master to settle such conveyance. When this is the case, after the Master has made his report of the appointment of the new trustees, the proper conveyances for vesting the estate in such new trustees are prepared, and brought into the Master's Office, and proceeded upon, in the same manner as other deeds.

It may be mentioned, with reference to this subject, that in the conveyance to new trustees, the Court will not insert a clause to enable the new trustees to appoint others in their stead, unless there is a provision to that effect in the original instrument by which the trust is created,² and that when the original deed does contain such a clause, the Court will not, on the application of the trustees themselves, appoint new trustees, without a reference to the Master;³ the rule of the Court being, that when persons are authorized to choose, if they will not exercise the power without coming to the Court, there must be a reference.⁴

1 *Attorney-General v. Dyson*, 2 S. & S. 528.

2 *Bayley v. Mansell*, 4 Madd. 228.

3 ——— *v. Roberts*, 1 J. & W. 251.

4 *Ib.*; vide *Webb v. Lord Shaftesbury*, 7 Ves. 490.

CHAPTER XLIII.

PAYMENT OF MONEY, AND TRANSFER OF STOCK INTO COURT.

When directed.

One of the most ordinary methods by which the Court enforces its jurisdiction of preserving property in dispute pending litigation, is, by ordering it to be brought in and deposited in Court.

Order 352 provides that "Money ordered to be paid into Court by any person, is to be paid into the Canadian Bank of Commerce, at Toronto, with the privity of the Registrar, and in no other manner."

In England, the officer in whose name money is deposited, is termed the "Accountant General," and his duties are, in this Province, performed chiefly by an officer here called the Accountant, under Orders 352 *et seq.* and 568 *et seq.* With this explanation the English cases can be read without misleading.

The payment of money or the transfer of stock into Court is most usually ordered, on interlocutory application, in the case of personal representatives, or other persons filling the character of trustees, having money in their hands, or stock under their control, to which the plaintiff can make out a *prima facie* title.¹ It is also frequently one of the terms upon which the Court grants an interlocutory injunction.²

It appears formerly to have been thought necessary for the plaintiff to show, in support of an application of this nature

¹ *Danby v. Danby*, 5 Jur. N. S. 54, M. R.; *Whitmore v. Turquand*, 1 J. & H. 236.

² *Ante.*

against an executor or trustee, that the executor or trustee had abused his trust, or that the fund was in danger from his insolvent circumstances; but now, except in the case of a creditor suing for his own debt only,¹ the Court will order so much of the trust estate as the executor or trustee admits to be in his hands, to be paid into Court, whether he has abused his trust or not, and without requiring proof of any danger to the property pending the litigation.²

The existence of a discretionary power in the trustees over the fund affords no reason why the fund should not be ordered to be paid into Court: unless the exercise of the power would be thereby prevented. If, however, the trustees are about to exercise their discretion in a proper manner, the Court will, in order to avoid useless expense, decline to order the fund to be paid into Court.³

In *Blake v. Blake*,⁴ Lord Redesdale appears to limit the rule, as regards personal representatives, to cases in which there are no debts, or the debts are all paid and there is no purpose for which the money is to be left outstanding; but the rule appears to be much more extensive: and any balance which may be in the executor's hands will be ordered into Court, notwithstanding there are demands upon it to which the executor is liable. Thus, in *Yare v. Harrison*,⁵ an executor, having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court: although he stated that an action at Law was depending against him for a debt to a considerable amount, due from the testator. Liberty was, however, given to the executor to apply, in case the plaintiff in the action should recover against him. If the conduct of the trustees has been proper, and all the *cestuis que trust* are not before the Court, the trustees will only be required to pay in the shares of those before the Court;⁶ and where the trustees of a creditors' deed, who had duly invested the funds, claimed a lien on it for their unsatisfied costs, an application by a single creditor, suing on behalf of himself and all other creditors, for an order for payment of it into Court, was refused.⁷

1 *Reese v. Goodwin*, 16 Jur. 1060, V. C. K. B.

2 *Strange v. Harris*, 3 Bro. C. C. 365; and see *Blake v. Blake*, 2 Sch. & Lef. 26; *Rutherford v. Dawson*, 2 Ball & B. 17; *Edwards v. Edwards*, 10 Hare, App. 69.

3 *Talbot v. Marshfield*, 2 Dr. & Sm. 285.

4 *Ubi sup.*

5 2 Coz. 377; but see *Betagh v. Concannon*, 2 Moll. 559.

6 *Hamond v. Walker*, 3 Jur. N. S. 686, V. C. W.

7 *Chaffers v. Headlam*, 17 Jur. 764, V. C. W.

The same principle will apply to all persons who fill the character of trustees: whether they are such by virtue of an actual appointment, or by implication. Thus, the Court has ordered an auctioneer to pay into Court the balance of the deposit upon a sale, admitted by him to be in his hands, after deducting his claims as auctioneer.¹ Upon the same principle, where a testator, having a debt secured on lands, bequeathed the debt to the mortgagor, with a desire that he would give a reversionary interest therein to a third person, and the mortgagor sold the estate, he was ordered to bring the mortgage money into Court, for the benefit of the devisee, subject to his own life-estate;² and so, where the defendant had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, he was ordered to pay it into Court.³ Where, also, the plaintiff, a shareholder in a company which had transferred its business, alleged that the directors of the company had, unknown to him and the other shareholders, received sums of money for making the transfer, they were ordered to pay such sums into Court.⁴

Where an executor admits a sum of money to be due from him, in his individual character, to his testator, the amount will be ordered to be paid into Court.⁵ This was done, notwithstanding a statement in the answer that the debts of the testator were not all paid, and that there were several outstanding for which the executor was liable.⁶ In such cases, the Court assumes that, as the persons to pay and the persons to receive are the same, what ought to have been done has been done, and orders the payment, not as a debt by a debtor, but as of monies realized, and in the hands of the executor or trustee.

Upon the same principle, money admitted by an executor to be in the hands of his partner, will be considered as in his own hands for the purpose of being called into Court;⁷ but in *Freeman v. Fairlie*,⁸ it was held, that an admission by an executor that the whole amount of the property was invested in India, on public securities, either in his own name or in the name of a house in

1 *Yates v. Farebrother*, 4 Madd. 239; and see *Bourne v. Mole*, 8 Beav. 177; *Nokes v. Seppings*, 1 Phil. 19.

2 *Lewis v. King*, 2 Bro. C. C. 600.

3 *Rothwell v. Rothwell*, 2 S. & S. 218.

4 *Gaskell v. Chambers* (No. 3), 26 Beav. 360; 5 Jur. N. S. 52.

5 *Rothwell v. Rothwell*, 2 S. & S. 218.

6 *Mortlock v. Leather*, 2 Mer. 491.

7 *Johnson v. Aston*, 1 S. & S. 73; *White v. Barton*, 18 Beav. 192; and see *Roy v. Gibbon*, 4 Hare. 65, 66.

8 3 Mer. 39.

which he was a partner, but subject to his disposal, unless some part was in the hands of the house at interest, which he believed, might be the case, was not a sufficient admission of money in his hands to order the payment into Court of any part of it: for although an executor, dealing with money in his hands, is bound to ear-mark it, yet, if he does not do so, and cannot answer as to the state of it, the Court has no power to act as upon an admission.¹

It is only upon the admission of the executor, or other trustee, that the trust money is actually in his hands that the Court will order it to be paid in. If, therefore, a defendant admits a sum of money to have come to his hands properly belonging to the trust, but adds that he has made, or will have to make, payments on account of the estate, he will be allowed to deduct the amount of the payments, and to pay in the balance only.²

This, however, will be the case only where the payments have been properly made. Where the payments have been improperly made: as where they involve a breach of trust: the trustee will not be permitted to avail himself of such payments for the purpose of resisting the payment into Court. Therefore, where executors had by their answer admitted the receipt of the testator's property, but stated that they had lent it on a promissory note: upon an application that they might pay the money thus lent into Court, it was held that, having admitted the receipt of the money, the executors could not, by alleging an improper application of it, protect themselves from payment into Court.³ So also, where monies, directed by a settlement to be laid out in government or real securities, were lent by the trustees to the husband on bond, the trustees were ordered, on motion, to pay the money into Court.⁴ This principle was likewise acted upon in *Rothwell v. Rothwell*,⁵ before referred to, in which the Court ordered the defendant to pay in a sum of money which he had contracted to pay to the trustees of his marriage settlement but had omitted to pay. And it is not only in cases where trust money has been improperly lent that it will be ordered into Court: it will be ordered in, even where the lending

¹ See *Roy v. Gibbon*, 4 Hare 65.

² *Anon.* 4 Sim. 359; *Roy v. Gibbon*, 4 Hare, t. 5.

Vigraas v. Binfield, 3 Madd. 62; see also *Beaumont v. Meredith*, 3 V. & R. 180; *Nokes v. Seppings*, 2 Phil. 19.

⁴ *Collis v. Collis*, 2 Sim. 365, 368.

⁵ 2 S. & S. 217.

may have been warranted by the trust deed, upon the allegation that the fund is in danger.¹

In order to induce the Court to direct the immediate bringing in of a sum of money upon an interlocutory application, the money must be clearly trust money. Where it is not impressed with a trust, but is in the nature of a mere debt, the Court will not make an order for the payment of it into Court till the hearing of the cause. Thus, in *Peacham v. Daw*,² where a bill was filed against a defendant, insisting that a certain sum of money claimed by her as a gift from the testator, shortly before his death, continued to be part of his assets, and upon the coming in of the answer the plaintiff moved that the defendant might pay the money into Court, on the ground that she had admitted circumstances in her answer which made it clear that it was part of the testator's assets, the application was refused.

Where a Court of Equity traces out trust money in the hands of a person who has not, *prima facie*, a right to hold it, that money must be brought into Court.³

It is not necessary, to induce the Court to order trust money to be paid in, that the trust should be one absolutely declared. It will, in many cases, do the same where the trust is only implied: as in the case of vendors and purchasers, where, as the Court considers what is agreed to be done as done, it will treat the vendor as a trustee for the purchaser of the estate contracted for, and the purchaser as a trustee for the vendor of the purchase money.⁴

Lord St. Leonards, in his learned Treatise upon the Law of Vendors and Purchasers of Estates,⁵ thus states the rule in practice of calling upon a purchasers of estates to pay their purchase money into Court, in a suit for specific performance: "A purchaser in possession of the estate, may, upon motion, be ordered to pay the purchase money into Court. This has been done before answer, but the purchaser has, in some cases, had the option to pay the

¹ *Payne v. Collier*, 1 Ves. J. 170.

² 6 Madd. 98.

³ *Leigh v. Macaulay*, 1 Y. & C. Ex. 280, 287; *Payne v. Collier*, 1 Ves. J. 170; see post.

⁴ *London & North-Western Railway v. Corporation of Lancaster*, 15 Beav. 22.

⁵ 5 pp. 229-231.

⁶ *Dixon v. Astley*, 1 Mer. 133, 378, n. (b); *Burroughs v. Oakley*, ib. 52, 376, n.; *Blackburn v. Stann*, 6 Madd. 69; *Pyke v. Northwood*, 1 Beav. 162, where tenant claimed option to purchase.

money, or give up possession ;¹ in others, occupation rent has been set, deducting interest upon the deposit ;² and in others, a receiver has been appointed ;³ and payment of the money will be ordered, although by the agreement it is payable by instalments, and a portion of it is to remain secured upon the estate.⁴ This rule has been adopted : where the possession has been given under a mutual apprehension that the title could be immediately made good ;⁵ where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase money, was insolvent and had attempted, without effect, to sell the estate ;⁶ where the purchaser approved of the title, and prepared a conveyance, and then raised objections ;⁷ where the purchaser had been guilty of *laches* and cut underwood ;⁸ and even in a case where it appeared, on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser.⁹ So where an acceptance of the title was inferred.¹⁰ Again, where a time was fixed for the payment of the purchase money by instalments, and the property was a coal mine.¹¹

“ If the estate be sold under a decree, and the purchaser enter into possession, he will be compelled to pay his purchase money into Court, unless he entered with the express consent of the Court.”¹²

But where the sale is not by the Court, and, upon a parol contract at so much per acre, there is a dispute as to the number, and possession was given without any understanding when the purchase money was to be paid, and the bill only seeks a performance as to the larger quantity :¹³ or the seller has thought proper to put the purchaser into possession, with an understanding between them that

1 *Clarke v. Wilson*, 15 Ves. 317 ; *Smith v. Lloyd*, 1 Madd. 83 ; *Morgan v. Shaw*, 2 Mer. 138 ; *Wickham v. Evered*, 4 Madd. 53.

2 *Smith v. Jackson*, 1 Madd. 618 ; *Smith v. Lloyd*, 1 Madd. 83.

3 *Hall v. Jenkinson*, 2 V. & B. 125 ; *Clarke v. Elliott*, 1 Madd. 606.

4 *Younge v. Duncombe*, Younge, 275.

5 *Gibson v. Clarke*, 1 V. & B. 500 ; and see S. C., cited 1 Madd. 607.

6 *Hall v. Jenkinson*, 2 V. & B. 125.

7 *Walters v. Upton*, G. Coop. 92, n. ; but see *Bonner v. Johnston*, 1 Mer. 366 ; *Crutchley v. Jerningham*, 2 Mer. 502.

8 *Burroughs v. Oakley*, 1 Mer. 52, 376, n. ; *Dixon v. Astley*, *ib.* 133, 378, n. (b) ; *Bradshaw v. Bradshaw*, 2 Mer. 492.

9 *Brown v. Kelly*, L. I. Hall, July 1816, M8.

10 *Boothby v. Walker*, 1 Madd. 197 ; *Smith v. Lloyd*, 1 Madd. 83.

11 *Buck v. Lodge*, 18 Ves. 450.

12 *Anon.*, L. I. Hall, 16 July, 1816, M8 ; *Wilding v. Andrews*, 1 C. P. Coop. t. Cott. 380.

13 *Benson v. Glastonbury Canal Company*, C. P. Coop. 42 : 1 C. P. Coop. t. Cott. 350.

he shall not pay his money until he has a title: the purchaser cannot be called upon to pay the money into Court in this summary way;¹ nor can the payment be compelled where the vendor gives possession without stipulation;² or the purchaser was in possession under another title before the contract;³ or the possession was given independently of the contract, and the seller has been guilty of *laches*;⁴ although, in such cases, the purchaser, may make himself liable to the demand, by dealing improperly with the estate, *e.g.*, cutting trees, or selling it to another person;⁵ or even ameliorating it, but changing the tenants.⁶ But the purchaser, after a long period, will not be permitted to keep possession of the estate and also withhold the purchase money: if a title has not been made, he will be put to his election within a reasonable time, *e.g.*, two months, to give up the possession or pay the purchase money."⁷

The same learned author then proceeds to deduce two simple rules from the cases: "1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course. But, 2ndly, If the possession by the purchaser, without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership: for example cutting timber by which the property is lessened in value; or selling the estate, by which the first seller's remedy is complicated without his assent: in such cases, the Court will interpose, and compel the purchaser to pay the purchase money into Court."⁸

Where the plaintiff having the conduct of a sale, neglects to pay into Court, the deposit paid him by the purchaser at the time of sale, the Court will, on the application of the purchaser, order him to do so. It appears that a purchaser at a sale under a decree has a right to take out the report on sale and get it confirmed, so as to

¹ *Gibson v. Clarke*, 1 V. & B. 500.

² *Clarke v. Elliott*, 1 Madd. 606; and see *Northern Counties Union Railway v. North Eastern Railway*, 6 W. R. 122, V. C. K., where possession was taken by the defendants, under a power given them by the legislature.

³ *Freebody v. Perry*, G. Coop. 91; *Bonner v. Johnston*, 1 Mer. 306.

⁴ *Fox v. Birch*, 1 Mer. 105.

⁵ *Cutler v. Simons*, 2 Mer. 103; *Bramley v. Teal*, 3 Madd. 219; *Gell v. Watson*, *ib.* 225.

⁶ *Bramley v. Teal*, 3 Madd. 219.

⁷ *Tindal v. Cobham*, 2 M. & K. 385; *Fowler v. Ward*, 6 Jur. 547, M. R.; *Adams v. Heathcote*, 10 Jur. 301, V. C. E.

⁸ *Suppl. V. & P.* 281.

obtain a certificate of the purchase to himself—at least where he is the sole purchaser.¹ And where a sale has taken place under a decree of the Court and has been confirmed, an order will be made for the purchaser to pay the balance of his purchase money into Court, though no enquiry has been made as to title.²

The principle of ordering money into Court upon a trust by implication, has been acted upon in several cases. Thus, the proceeds of a fire policy, upon a freehold house, which had been renewed by an executrix after the death of a testator, were directed to be brought into Court, on the application of the widow, in a suit instituted by her for the administration of the testator's estates: not on the ground that the proceeds of the policy formed part of the personal estate, but because they were affected with a trust for the benefit of the persons interested in the real estate.³ And where good had been specifically, and not generally, consigned by a trader abroad to merchants in this country, the proceeds of the consignment, were held to be trust money in the hands of the consignees, and, upon a bill filed against them by the representative of the trader for an account, were ordered to be brought into Court.⁴

The practice of the Court with regard to compelling the payment into Court of money constituting partnership property, has been stated⁵ in the following manner:—"As the rule is that he who seeks equity must do equity, it seems clear that, where the plaintiff is a private debtor to the partnership, he cannot insist upon an account, without paying the amount of his debt into Court. Thus, in an early case, it is laid down, that if one partner borrows any money out of the partnership trade, his own share shall be answerable for it; and he shall not be permitted to come into Equity, and pray an account without making satisfaction for the debt.⁶ So, in a case before Lord Nottingham, one partner having sued the other for money had and received, and the latter having filed his bill for an injunction to stay

¹ *Crooks v. Glen*, 1 Cham. Rep. 354.

² *Stewart v. Stewart*, 1 Cham. Rep. 243; but see *Crooks v. Street*, 1 Cham. Rep. 95, and cases collected, *ante*.

³ *Parry v. Ashley*, 3 Sim. 97.

⁴ *Leigh v. Macaulay*, 1 Y. & C. Ex. 260, 267; and see *Venning v. Loyd*, 1 De G. F. & J. 193; 6 Jur. N. S. 81, where the proceeds of a policy of insurance had been assigned, and there was a conflict of jurisdiction.

⁵ *Collyer on Partnership*, 290; and see *Lindley*, 817.

⁶ 16 Vin. Abr. Partners (E), 5; *Meliorucchi v. Royal Exchange Assurance Company*, 1 Eq. Ca. Abr. 8, pl. 8.

proceedings at Law and for an account, the Court entertained the suit, and decreed an account: the plaintiff having first paid into Court the money in question.¹ Upon similar principles it should seem, that if the defendant could by any means show that a specific sum is due from the plaintiff to the partnership as a private debt, that sum must be paid into Court by the plaintiff before an account will be decreed. But one partner whether plaintiff or defendant, may receive partnership money and effects, and insist on not paying in the amount, unless all the other partners will pay in what they have in their hands;² and it has been laid down by Lord Eldon, that if a partner, as partner, receives money belonging to the firm, and admitting that he has received it, insists that there is a balance in his favour, there is no pretence for making him pay it in."³ If, however, a partner has received partnership money, under circumstances, from which it can be inferred that he had agreed not to receive it, and that his receiving it was contrary to good faith, he may be ordered to pay it into Court.⁴

The general rule is, that a partner will not be ordered to pay partnership money into Court, unless there is a clear admission, not only that he has the money, but that he is liable to pay it.⁵

Upon the principal of preserving property pending litigation, a party to an administration suit, who has been found to be a debtor to the estate, and is in insolvent circumstances, will be ordered to pay the amount of the debt immediately, into Court: if the debtor is a stranger to the suit, the usual course is to direct an inquiry as to what should be done.⁶

The rule is that money belonging to infants is not ordered in equity to be paid to their guardian whether appointed by the Surrogate Court or otherwise, but is secured for the benefit of the infants under the authority of this Court; but the rule may not apply when the amount is small and is required for the maintenance, educa-

1 *Gold v. Canham*, 2 Swanst. 325, n.: 1 Ch. Ca. 311.

2 *Foster v. Donald*, 1 J. & W. 252.

3 *Ibid.* 252; but see *Toulmin v. Copland*, 3 Y. & C. Ex. 643, where, although payment in was directed, leave was given the defendant to apply for repayment, out of a fund previously paid in, of any sums which he might pay in discharge of the partnership debts.

4 Per Lord Eldon, in *Foster v. Donald*, 1 J. & W. 252.

5 *Collyer on Partnership*, 202; and see *Lindley*, 817; *Richardson v. Bank of England*, 4 M. & C. 165, 171; 2 Jur. 911; but see *Donneville v. Solly*, 2 Russ. 372.

6 *Walker v. Simpson*, 1 Jur. N. S. 675; not reported on this point, 1 K. & J. 713.

tion or other immediate use of the infants, or where some other special circumstances exist justifying an exception to the general rule. When one of the trustees was dead, and another was removed for misconduct, the remaining trustee was held to be entitled to be discharged from the trust.¹ Where the trustee for infants resided out of the jurisdiction, and a person resident within the jurisdiction had a contingent interest in the trust fund, the fund was ordered to be secured in Court, instead of being paid over to the trustee.² In consequence of the danger to which the fortunes of infants are often exposed in private hands, the Court, on the administration of an estate, takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee. Since the establishment of a Government Dominion Stock the investment of infant's money by the Court should, as a general rule, be in such stock, rather than as formerly, in mortgages. When new trustees are to be appointed, it is contrary to the course of the Court, without some very special reason to sanction the appointment of one trustee in place of three.³

Although the Court will order trust money, admitted to be in the hands of a party, to be paid in, on interlocutory application, it will not order interest upon such money to be so paid.⁴ The only case in which the Court appears to have acted in opposition to this rule is that of *Freeman v. Fairlie*;⁵ but that was under peculiar circumstances: the defendant having, by his answer, admitted that he had made interest to a larger amount than the sum he was ordered to pay in; and Lord Eldon said, he was very unwilling to carry the practice further than it had been carried.

The same principles which apply to trust monies, and will induce the Court to order them to be paid into the Bank, to the credit of the cause, will be acted upon in the case of trust stock, or trust money invested in exchequer bills: which the Court will order the party holding to transfer into the name of the Accountant-General, in trust in the cause, or deposit in the Bank to the credit of the cause. The Court will also, wherever it may be necessary for their

¹ *Mitchell v. Richey*, 13 Grant, 445.

² *Stilennan v. Campbell*, 13 Grant, 454.

⁴ *Wood v. Downes*, 1 V. & B. 50.

³ *Kingemill v. Miller*, 15 Grant, 171.

⁵ 3 Mqr. 29, 44

protection, order specific chattels to be deposited in the Bank with the privity of the Accountant-General.

A trustee or executor does not, by payment of the trust fund into Court, discharge himself of his office;¹ nor does a payment of money into Court, upon an interlocutory application, alter the rights of the parties interested in the fund.² Therefore, if an executor or administrator pays into Court money which he has received from the estate of the deceased, his right to retain a debt due to him from the deceased is not prejudiced;³ and where the fund in Court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied.⁴

It has been said, that funds belonging to wards of Court cannot be transferred into the name of the Accountant-General to the credit of the cause, until the accounts have been taken, and the certificate made; this, however, must be understood as meaning merely not that such a transfer cannot be made, but that it will not operate as a discharge to the trustees until they have passed their accounts.⁵

How applied for.

When it is said, that where a Court of Equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it; that money must be brought into Court,⁶ the *dictum* must be understood as implying that the person applying to have it brought in must have an interest in its protection. The general rule may be stated thus: that the plaintiffs must be solely entitled to the fund, or have acquired in the whole fund such an interest, together with others, as entitles them, on their own behalf and the behalf of those others, to have the funds secured in Court.⁷

¹ *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

² *Noble v. Stow*, 29 Beav. 409. The only instance in which the payment into Court will affect the right of the parties is, where money due to a wife is paid into Court, in a suit to which the husband and wife are parties: which will have the effect of depriving the wife of her right by survivorship, unless the payment be into the joint names of the husband and wife: see *Laprimaudays v. Teissier*, 12 Beav. 206; and *ante*.

³ *Langton v. Higgs*, 5 Sim. 228; and see *Hall v. Macdonald*, 14 Sim. 1; *Tipping v. Power*, 1 Hare. 406, 411; *Middleton v. Poole*, 2 Coll. 246.

⁴ *Chisum v. Dewes*, 5 Russ. 29; *ante*.

⁵ *Bencraft v. Rich*, 1 Bro. C. C. 56; see *ib.* Ed. Belt. n. (1).

⁶ *Ante*.

⁷ *Freeman v. Fairlie*, 3 Mer. 29; *Wilton v. Hill*, 2 De G. M. & G. 807, 809.

Although the Rule of Equity is that money in the hands of a stakeholder held for the benefit of others whose rights are to be disposed of by the Court, will usually be ordered into Court, still in such a case it must be clear that some of the parties litigant are entitled to the fund or a portion of it. Where, therefore, certain moneys, the proceeds of a policy of insurance which had been deposited with the attorney of a bank for the purpose of being held in trust for such bank, and with the proceeds to pay off the liabilities of the party making such deposits to the bank, had been paid to, and were still in the hands of the attorney, and the depositor, without showing what amount was due to the bank applied to have the money paid into Court by the Attorney: the Court under the circumstances refused the application.¹

It seems, however, that where the plaintiff is merely entitled to a portion of a fund, which portion is clear, he will only be permitted to have the portion, to which he is entitled, secured: therefore, where a widow, as administratrix of her husband, was called upon to transfer into Court a sum of Bank Annuities which formed part of the personal estate of her husband, whose debts had all been paid, the Court of Exchequer thought that, as she was clearly entitled to a third of the personalty, they could not keep her out of the possession of that part;² and accordingly granted the application only as to two-thirds of the Bank Annuities.³ If the applicant has a clear interest in one part, and a contingent interest in the remainder of the fund, the whole will be ordered to be paid into Court.⁴ If the interest is not clear, the fund will not in general be ordered to be paid in.⁵ If the interest is contingent, the fund may be ordered to be paid in; but then, there must be some reason shown for the interference of the Court.⁶

Applications for payment of money or transfer of stock into Court before decree are usually made by motion: which must be served on the party required to make the payment or transfer. If opposed, the motion is frequently adjourned for hearing in Court.⁶

¹ *Corbett v. Meyers*, 10 Grant, 36; and see *Leonard v. Black*, 5 U. C. L. J. 280.

² *Rogers v. Rogers*, 1 Anst. 174.

³ *Bartlett v. Bartlett*, 4 Hare, 631.

⁴ *St. Victor v. Devereaux*, 13 Sim. 641; *Score v. Ford*, 7 Beav. 333, 336.

⁵ *Ross v. Ross*, 12 Beav. 89; and see *Bartlett v. Bartlett*, 4 Hare, 631; *Maryatt v. Maryatt*, 2 W. R. 576, V. C. K.

⁶ See *Seton*, 47.

Applications of this nature are most commonly made upon admissions contained in the answer; but they may be made upon an admission contained in an affidavit, or in any other proceeding in the suit.¹ At the hearing of a cause, an application may be made for the payment of a fund into Court without previously giving notice.²

To support an application for the payment of money into Court upon the answer, there must be an admission in the answer of the plaintiff's title as stated in the bill; and not merely an admission with reference to the case made by the answer.³ An absolute admission of title is not required; merely such a probability of title as the Court can safely act on;⁴ but if the defendant by his answer merely says he does not know and cannot set forth, as to his belief or otherwise, whether the plaintiff sustains the character he assumes, an order will not be made.⁵

The plaintiff will not be allowed to make use of affidavits to supply any defect in the answer: the rule of the Court being, that the order shall be made upon the defendant's admission alone.⁶ This rule, however, must be understood as applying to proof of the plaintiff's title: for it has frequently been decided that though the Court will not, upon an application of this sort, allow affidavits to be read in support of the plaintiff's title, it will receive affidavits to verify collateral facts. Thus, upon a motion that a purchaser may pay his purchase-money into Court, it will allow affidavits to be read to prove that he has exercised acts of ownership.⁷

As the Court will not order money into Court where there is no admission of the plaintiff's right, still less will it do so where it is denied by the answer: therefore, if a bill is filed, stating a settled account, and by the answer it is denied that the account is just, the plaintiff cannot move that the defendant may pay into Court the

¹ *Seton*, 62.

² *Isaacs v. Weatherstone*, 10 Hare, App. 30.

³ *Proudfoot v. Hume*, 4 Beav. 476; see also *Boschetti v. Power*, 8 Beav. 98; 8 Jur. 1085; *Rothwell v. Rothwell*, 2 S. & S. 217.

⁴ *McHardy v. Hitchcock*, 11 Beav. 73, 77; *Whitmore v. Turquand*, 1 J. & H. 290.

⁵ *Dobbes v. Flint*, 4 M. & C. 50; and see *Farrer v. Hutchinson*, 3 Y. & C. Ex. 706; *Edwards v. Edwards*, 10 Hare, App. 63.

⁶ *Black v. Creighton*, 2 Moll. 554; *St. Victor v. Denereaux* 13 Sim. 641; *Roschetti v. Power*, 8 Beav. 98.

Bradshaw v. Bradshaw, 2 Mer. 492; *Crutchley v. Jerningham*, *ib.* 502; see *ante*.

money on the account so admitted : as he might, if the account were admitted to be correct.¹

It must also be admitted, that there is a balance actually in the hands of the defendant.² It is not, however, necessary, that the actual amount of the balance should be stated. If the admission is contained in a schedule not cast up, the sum may be cast up ; and, on affidavit of the amount of what appears to be due, the order will be made ;³ but as, in such cases, the admission only is relied upon, no affidavit can be used in support of the application, except that of a calculator or accountant who examines the schedule, and swears to the amount in the hands of the executor appearing therefrom.⁴

As the application must be founded on an admission, it is necessary, where the application is founded upon an account appearing in a book, that the book must have been referred to in such a way as to make it part of the admission ; and where the defendant has referred to several books, it will not be sufficient to make the application upon the casting up of some of the books ; it must be the result of all the books.⁵

The indulgence which is allowed to a plaintiff of verifying the amount of the balance admitted will, in certain cases, be extended to the defendant. Thus, where an executor admits, in his answer, that he has received a specific sum belonging to the testator's estate, but adds that he has made payments on account of the estate, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and then will order him to pay the balance into Court.⁶

It may be noticed in this place, that in a case before Sir A. Hart, L.C., in Ireland, the question arose whether the executor was entitled to retain enough to answer the probable accruing expenses

1 ——— v. *Bailey*, 30 July, 1805, 2 Madd. Ch. Pr. p. 400, 2nd ed. ; p. 523, 3d. ed. ; see also *Richardson v. Bank of England*, 4 M. & C. 165, 177 ; but see *Domville v. Solly*, 2 Russ. 372, where, although the plaintiff's title was denied, he was able to show from the case stated in the answer that he had an interest.

2 In respect to what will be considered as money in the hands of a defendant, see *ante*.

3 *Mills v. Hanson*, 8 Ves. 68 ; *Quarrell v. Beckford*, 14 Ves. 177.

4 *Black v. Creighton*, 2 Moll. 554 ; *Boschetti v. Power*, 8 Beav. 98 : 8 Jur. 1055 ; see also *Richardson v. Bank of England*, 4 M. & C. 165, 177 : in which the principles upon which money is ordered into Court upon a defendant's admission are very fully reviewed.

5 *Mills v. Hanson*, 8 Ves. 68 ; *Roe v. Gudgeon*, G. Coop. 304.

6 *Anon.* 4 Sim. 359.

of suits; and his Lordship upon that occasion observed, that Sir John Leach had always held the opinion that the executor should bring in all; but that when he (Sir A. Hart) was Vice-Chancellor he had acted on a different principle; and that he thought the Court had no right to cramp any executor who was engaged in suits, by leaving him to carry on those suits with his own funds, and that Lord Eldon^a had sustained his views in that respect. "I do not mean," his Lordship continues, "merely costs already incurred: there never could be any doubt about them; but probable growing costs. I know it is said, the executor can come to the Court for money to be advanced to him as he wants it; but I do not think he is to be compelled to do that."¹ The opinion of Sir Anthony Hart, however, in the case referred to, appears to be at variance with that of Lord Thurlow in *Yare v. Harrison*.²

Money or stock may be ordered to be paid or transferred into Court, after decree, on an application by motion: to be served on the party to make the payment or transfer. The application cannot then, however, be made upon admissions contained in the answer;³ but must be founded upon admissions contained in the accounts brought into Chambers,⁴ or upon the Chief Clerk's certificate.⁵

The rules which govern applications of this nature, at this stage of the cause, are the same as those which govern applications upon admissions in the answer: with the exception however, that the party applying need not be the plaintiff in the cause. Indeed, if the plaintiff be the accounting party, the application may be made against him. It is also unnecessary to show the title of the party to make the application, if such title appear from the decree or other proceedings in the cause.

Where the application is made upon the Master's report, the accounting party will not be ordered to pay the fund into Court until the expiration of the period within which an application to discharge or vary the certificate may be made.⁶ Upon the hearing

1 *Betagh v. Cancannon*, 2 Moll. 559.

2 2 Coz, 377; *ante*.

3 *Wright v. Lukes*, 13 Beav. 107; *Binus v. Parr*, 7 Hare, 238; *Burn v. Bowes*, 6 L. J. Ch. 275, M. R.

4 *Hatch v. —*, 19 Ves. 116; and see *Wood v. Downes*, 1 V. & B. 49; *Fox v. Mackreth*, 1 Ves. J. 69.

5 *Gordon v. Rothley*, 3 Ves. 572; *Creak v. Capell*, 6 Madd. 114.

6 *Douthwaite v. Spensley*, 18 Beav. 74; see *Gordon v. Rothley*, 3 Ves. 572, and *Creak v. Capell*, 6 Madd. 114, for the former practice. As to applications to discharge or vary the certificate, see *ante*.

of an application to vary the Master's report, it is competent for the Court, although it accedes to the application, and directs the report to be reviewed, to order the accounting party to pay a sum of money into Court, without a special application for that purpose. The Court will not do so, however, unless it is satisfied that the probable result of the direction to review the report will be the finding such a sum due from the party.¹

The cases in which the Court would, under the former practice, order money into Court before answer were very rare. In *Jervis v. White*,² Lord Eldon made such an order upon the ground of fraud; and in doing so stated, that he fastened upon the affidavit of the defendant in answer to that filed by the plaintiff, as Lord Kenyon had done in *Vann v. Barnett*:³ where, though it was held that in general, in such cases, the Court would not act effectively between the parties till the answer comes in, yet, if the defendant answers the affidavit, the Court would look at the affidavit as if it were the answer.

The Court has also, as has been already stated, ordered the purchaser of an estate to pay his purchase-money into Court, before the answer has been put in.

Our Order 353 provides that "A person desiring to pay money into Court is to produce to the Ledger Clerk the order, if any, under which the same is payable, and is to file a *præcipe* in the form set out in Schedule O." Order 354 that "That the bank on receiving money to the credit of any cause or matter, is to prepare a receipt therefor in duplicate: and one copy is to be delivered to the party making the deposit, and the other is to be posted or delivered the same day to the Ledger Clerk."

¹ *Brown v. De Tastet*, 4 Russ. 126.

² 6 Ves. 738; *Richardson v. Bank of En. and*, 4 M. & C. 165; *Dublon v. Flint*, *ib.* 502.

³ 2 Bro. C. C. 158.

CHAPTER XLIV.

PAYMENT OF MONEY AND TRANSFER OF STOCK OUT OF COURT.

When money has been paid, stock transferred, or specific articles deposited in Court, the decree or order at the original hearing, or upon the further consideration of the cause or matter, frequently provides for the payment, transfer, or delivery of the same to the parties then entitled thereto. It, however, often happens that the rights of the parties to the effects in Court, at the time when the decree or order is made, are not such as to enable the Court then to make an order for absolute payment, transfer, or delivery to them. Under such circumstances, where it appears that a certain proportion of the fund in Court, or a precise sum, belongs to any particular party or set of parties, and there is any incumbrance affecting such share, or the interest in it is delayed until the happening of some event; as, for instance, till the party attains the age of twenty-one, or till the death of a previous tenant for life: the Court will, on the hearing, order the share to be carried over in trust in the cause or matter, to a separate account: liberty to apply being, at the same time, given to the parties.¹ The effect of carrying over a fund to a separate account is to release it from the general questions in the cause; and to mark it as being subject only to the questions arising upon the particular matter referred to in the heading of the separate account, so that, in all subsequent dealings with the fund, those parties only need be served who are interested in it. Care must, therefore, be taken in the heading of the account: as from it the Court sees to what extent the fund has been severed from the questions in the cause.² The mere carrying over of a fund to the separate account of any person is not, how-

¹ *Ante*.

² *Re Jervoise*, 12 Beav. 209; and see *Salmon v. Anderson*, 9 Beav. 445; *Handley v. Metcalfe*, 3, 485; *Laprimaudaye v. Teissier*, 12 Beav. 206; *Re Tillstone*, 9 Hare, App. 59; *Noble v. Stoe*, 29 Beav. 400; *Seton*, 63. For a collection of forms of headings, see 12 Beav. 210, n.

ever, equivalent to a decree declaring such party to be absolutely entitled. Any error may, therefore, be corrected by an original bill; and it is not necessary to file a bill of review, nor to have the decree or order directing the carrying over reheard.¹ If the fund has not been dealt with for many years, the Court will not order it to be paid out to the personal representative of the person in whose name it is standing, in the absence of the persons beneficially interested;² and where the fund has passed by the will of the person entitled to it, it will not be paid to the legatee, in the absence of the personal representative of the testator.³

There are some cases in which, although the interest of a party in the fund is not absolute but subject to a contingency, the Court has not directed the fund to be carried to a separate account, but has ordered it to be paid out at once: the contingency being remote, and the parties receiving the money entering into a recognisance to refund it, in the event of the happening of the contingency. This was done in the case of *Leng v. Hodges*,⁴ where the right of the parties was subject to the contingency of a female who was then of the age of sixty-nine years having children; and in the case of *Brown v. Pringle*,⁵ a legacy to a woman for life, with remainder to her children, paid out of Court on the petition of the mother and children, the children having attained twenty-one, and the mother being sixty-six years of age. In this case, the fund being small, and the contingencies remote, Sir James Wigram, V.C., only ordered the parties to undertake to account for it as the Court should direct, in case of other children being born; and no recognizances were entered into; and where the contingency was very remote, the fund has been paid out, without even an undertaking to account for it.⁶

1 *Noble v. Stow*, 29 Beav. 409; *ante*, and see *Ex parte Breach*, 10 Jur. N. S. 992: 12 W. R. 760, M. R.; and *Sheppard v. Sheppard*, 33 Beav. 129.

2 *Edwards v. Harney*, 9 Jur. N. S. 453: 11 W. R. 330, M. R.; and see *Loy v. Duckett*, C. & P. 305.

3 *Re Acker*, 11 W. R. 182, V. C. S.

4 *Jac*. 585; see also *Fraser v. Fraser*, *ib.* 586, n., where the lady was fifty-five, and unmarried; *Deffis v. Goldschmidt*, 19 Ves. 566; *Payne v. Long*, cited *ib.* 571; *Webber v. Webber*, 1 S. & S. 311; *Lyddon v. Ellison*, 19 Beav. 565; *Edwards v. Tuck*, 23 Beav. 268; *Kennedy v. Sedgwick*, 3 K. & J. 540; *Vidler v. Parrott*, 12 W. R. 976, V. C. K. But it seems that the Court will not treat a woman as past the age of childbearing until she is fifty; although positive medical evidence that she is past childbearing is adduced: *Groves v. Groves*, 12 W. R. 45, V. C. W.

5 4 *Hare*, 124. As to payment out, on presumption of death, see *Dowley v. Winfield*, 14 Sm. 277; *Cuthbert v. Purrier*, 2 Phill. 199; *Laub v. Orten*, 6 Jur. N. S. 61: 8 W. R. 111, V. C. K.; *Dunn v. Snowden*, 2 Dr. & Sm. 201; *Thomas v. Thomas*, 2 Dr. & Sm. 298.

6 *Miles v. Knight*, 12 Jur. 666, V. C. E.

Another instance in which the Court used to order money to be carried over to a separate account, occurred when the party entitled to it was a married woman. In such a case, the practice was, notwithstanding her interest in the fund was immediate, for the Court on decree, not to order payment at once, but to direct that the fund be carried to the account of her and her husband.¹ After the fund had been thus transferred, a petition was presented by the husband and wife, or such a petition was brought on together with the cause on further directions. The present practice, however, is different, and has been stated in a former part of this work.

Formerly, whenever a fund had been carried to a separate account, and the title to it was clear, an order for payment might have been obtained by motion;² but now, the application should be made by petition:³ unless the fund is small,⁴ or the application is for payment of the dividends or interest of any stocks, funds, or securities standing to the credit of any cause or matter depending to the separate account of the applicant; in which cases, it may be made by motion.⁵

An order for the payment of money out of Court will not be made *ex parte*; the party who has paid it in must be served with notice.⁶ And where the purchase-money for lands sold under a mortgagee was paid into Court, it was held that the mortgagor must have notice of any application to pay to the plaintiff amounts found due to him by the Master's report.⁷ Where a certain sum of money ordered to be paid to the plaintiff under a decree had, pending a rehearing and appeal, been paid into Court by arrangement between the parties, to obtain a stay of proceedings, in lien of the security required by sub.-sec. 4 of sec. 16 of the Act relating to appeals; and on the appeal the decree was affirmed only in part, that part directing the payment of the money, being in part reversed by the amount being reduced to a comparatively small sum; a motion to

1 *Campbell v. Harding*, 6 Blm. 283.

2 *Heathcote v. Edwards*, Jac. 504.

3 *Gariatt v. Niblock*, 5 Beav. 148; *Blind School v. Govea*, 21 L. J. Ch. 144, V. C. Ld. C.; *Joad v. Ripley*, 3 Jur. N. S. 432, V. C. S.; but see *Oliver v. Burt*, 1 Beav. 583; *Linford v. Cooke*, 6 W. R. 5, V. C. K.

4 *Seton*, 157; *Petty v. Petty*, 12 Beav. 170; and see *Winkworth v. Winkworth*, 32 Beav. 233; 9 Jur. N. S. 61, where leave was given to make future applications at Chambers.

5 Ord. 197. If the application is for the payment of arrears of dividends exceeding £300, it must be by petition: *Joad v. Ripley*, 3 Jur. N. S. 432, V. C. S. This rule, however, is not adhered to.

6 *Bullen v. Renewick*, 1 Cham. Rep. 213.

7 *Smith v. Kerr*, 3 Grant, 609.

pay out the money to the party who had paid it in was granted by the secretary, though strenuously opposed, and his order was confirmed on appeal to the full Court.¹

The petition or notice of motion must be served on all the persons appearing to be interested therein.² In the case, however, of applications where the persons interested were numerous, and, under the circumstances, it must be supposed that they would be informed of what had been done, service upon all has been dispensed with.³ Where a fund bequeathed to one for life, with remainder to a class, the members of which, as well as their shares, had been ascertained by the Master, had been carried to a separate account, the Court on petition presented after the death of the tenant for life, directed the transfer of one-ninth of the fund to the person who appeared by the Master's report to be entitled to it, without service of the petition on the persons entitled to the other eight-ninths.⁴ If, in consequence of the heading of an account, a person is properly served with notice of the application, but the Court considers his appearance unnecessary, he may be disallowed his costs.⁵ Where the person to whose account the fund has been carried has assigned his interest, he must, generally, be served with notice of any application by the assignee;⁶ and if the assignment is disputed, the Court will refuse to order the fund to be paid without a suit to determine the rights of the parties being instituted.⁷

Unless, upon the hearing of the application, the title of the applicant to the immediate payment of the fund is made clear by the Master's report, or by the previous orders of the Court, it must be supported by evidence of all the facts necessary to establish the title. The same mode of proof is necessary as that required to prove similar facts upon other occasions. Application should also be made to the Registrar for a certificate of the amount of the fund sought to be affected, as well for the purpose of stating correctly the description of the fund, as also for the sake of ascer-

¹ *Lindsay Petroleum Company v. Hurd*, 3 Cham. Rep. 16.

² *Seton*, 63; *Dallimore v. Ogilby*, 16 Jur. 443, V. C. K.

³ *Re Hodges*, 6 W. R. 487, V. C. K.; see also *Re Midland Railway Company*, 11 Jur. 1096, M. R.

⁴ *Lambert v. Newark*, 3 De G. & S. 405.

⁵ *Re Justices of Coventry*, 10 Beav. 158.

⁶ *Briant v. Dennett*, 4 Drew. 550; 5 Jur. N. S. 563.

⁷ *Wastell v. Leslie*, 15 Sim. 455, n.; *Thorndike v. Hunt*, 3 De G. & J. 563; 5 Jur. N. S. 879.

taining whether the fund is affected by any stop order; and this certificate must be left with the Registrar when the order is bespoken.

If the applicant is one of a class among which the fund is divisible, he should also ask that the shares of the others may be carried to their separate accounts, in order to save expense on the occasion of future applications.¹

A prospective order for the payment of interest on funds to be subsequently paid into Court may be made;² but the Court has refused to make any order dealing prospectively with the purchase money of an estate contracted to be sold, but not paid for.³

The Court will not, in general, order payment out of the principal or interest of a fund except on the responsibility of the executors, until it has ascertained, by taking the accounts, that the fund is clear.⁴

Where any person is absolutely entitled to the fund, the Court will not, as a general rule, permit the fund to remain in Court, and make an order directing payment of the interest only;⁵ but the Court will not direct a trust fund to be paid out to a sole trustee, except on the consent of parties beneficially interested;⁶ and where the person entitled was deaf, dumb, and blind, the Court declined to order a transfer of stock into such person's name, but directed the interest to be paid to two persons for the benefit of such person: they undertaking so to apply it, and to account as the Court should direct.⁷ Where an infant domiciled in Prussia was, under the limitations of her mother's marriage settlement, entitled to a sum of 2000*l.*, the Court ordered it to be paid to her father: there being no trustees of the settlement, and it being proved that, according to Prussian Law, he was entitled, in the capacity of her guardian, to receive and administer, during her minority, the property coming to her under the settlement.⁸

¹ *Re Hawke*, 18 Jur. 33, V. C. K.; see also *Re Tillstone*, 9 Hare, App. 59.

² *Re Chamberlain*, 22 Beav. 286.

³ *Re Bowes*, 12 W. R. 569, V. C. K.

⁴ *Abby v. Gilford*, 11 Beav. 28; see also *Digby v. Boycott*, 4 Hare, 444; *Knight v. Knight*, 16 Beav. 358; *Re Wright*, 15 Beav. 367.

⁵ *Isaac v. Gompertz*, 1 Ves. J. 44.

⁶ *Re Roberts*, 7 Jur. N. S. 818; 9 W. R. 758, V. C. K.; *Grant v. Grant*, 6 N. R. 347, M. R.

⁷ *Re Biddulph*, 5 De G. & S. 469.

⁸ *Re Brown*, 13 W. R. 877, V. C. W.

A report had been made in a suit for the sale of mortgaged property finding that the plaintiff (the mortgagee) was the only incumbrancer on the property, and that the annual amount due to him was £235 12s. 10d. The property was sold for £261, and the purchase money had been paid into Court. Two years after the date of the report a motion for payment of the whole purchase money out of Court to the plaintiff was granted without a reference to the Master to take a subsequent account, it being clear that the interest and the costs of the sale would make the plaintiff's claim larger than the amount of the purchase money paid in.¹ Where a defendant refused to consent to the payment out of Court of mortgage money paid in by him, the plaintiff obtained an order for payment out, but at his own costs.²

Where an order is made, on an application in an administration suit, for the payment of income to a tenant for life, the costs of all parties must be paid out of the income.³ The sum of 10l. (without taxation,) is usually allowed by the Master of the Rolls for the costs of a petition for the payment out of Court of a fund standing to a separate account, and in which no one but the petitioner is interested.⁴

A considerable interval of time frequently occurs, after the hearing of a cause, before any person acquires such an interest in the fund in Court as to be entitled to obtain an order for payment. In many cases, therefore, when the period arrives, the cause will have become abated. It seems clear, however, that the mere abatement of the suit will not be considered a reason for refusing to pay money out of Court to persons whose rights to the money arise out of the decree.⁵ Thus, in *Roundell v. Currer*,⁶ where the fund had been carried to the separate account of the plaintiff, and after his death a petition was presented by his personal representative for payment of the fund, his right to which was clear, but there was a doubt whether an order could be made in a cause after an entire abatement by the death of the plaintiff, Lord Eldon, after con-

1 *Gilmour v. O'Brien*, 1 Cham. Rep. 244.

2 *Bernard v. Alley*, 2 Cham. Rep. 91.

3 *Eady v. Watson*, 33 Beav. 481; 10 Jur. N. S. 982.

4 *Gover v. Stillwell*, 21 Beav. 182; *Seton*, 94; *Morgan & Davey*, 46. But our Court has no such practice.

5 *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2, pl. 7; and see *ante*.

6 6 Ves. 250; see also *Lord Shipbrooke v. Lord Hinchbrook*, 13 Ves. 387; *Beard v. Earl of Powis*, 2 Ves. S. 399.

sideration, made the order. In *Legard v. Hodges*,¹ a petition was presented in a very old cause,² and from the title of the petition it appeared that all the plaintiffs and defendants were then dead. By the decree, liberty to apply had been reserved upon the death of a certain tenant for life : whose death gave the petitioner a right to the fund. Notwithstanding the complete abatement of the cause, Sir Lancelot Shadwell, V. C., in the first instance, directed an inquiry, and afterwards made an order for the payment of the fund out of Court.

The mere dismissal of the bill also is not a reason for refusing to pay the fund out of Court to the persons entitled ;³ and where a sum has been paid into Court by the plaintiff, to abide the result of certain proceedings at law sought to be restrained by the suit, it will not be kept in Court, after the dismissal of the bill with costs, for the purpose of answering the defendant's costs.⁴

Where there are several persons entitled for life in succession to a fund in Court, the Court usually directs the interest to be paid to the first tenant during his life, and a further order must be obtained on his death ;⁵ but where a husband and his wife are so entitled, payment will be directed to them in succession, and the payment will be continued to the survivor, on proof by affidavit to the Accountant-General of the death of the other.⁶

In the case, also, of a corporation sale, the interest will be ordered to be paid to the holder of the office for the time being.⁷

Payment of interest will also be directed to the trustees of charities and their successors ; and if trustees are more than two in number, it will be directed to be paid to them, or any two of them ;⁸ and if there are two only, it will be ordered to be paid to them, or either of them ;⁹ and this is a convenient form of

1 V. C. of England, 26 July, 1844, *ex relatione* Mr. Tripp.

2 Reported on the bearing, 4 Bro. C. C. 421.

3 *Wright v. Mitchell*, 18 Ves. 283 ; *Taylor v. Waters*, 1 M. & C. 286, 271.

4 *Flockton v. Peake*, 12 W. R. 789, V. C. W.

5 *Seton*, 70 ; but see *Re Brent*, 8 W. R. 270, M. R., where the order was extended to a successive tenant for life.

6 *Re How*, 15 Jur. 206, V. C. K. B.

7 *Seton*, 70. For form of order, see *ib.* 63, No. 3 ; see also *Attorney-General v. Brandreth*, 1 Y. & C. C. 200, 203 ; *Ex parte Archbishop of Canterbury*, 2 De G. & S. 385 ; *Attorney-General v. Vint*, 3 De G. & S. 704 ; *Re Pearce*, 24 Beav. 491.

8 *Attorney-General v. Brickdale*, 8 Beav. 228.

9 *Re Clinton*, 6 Jur. N. S. 601 ; 8 W. R. 492, V. C. W.

order: for, if the whole number of trustees join in a power of attorney, the Accountant-General will pay, upon proof that any two are living: whereas, if the order directs the payment to be made to the trustees and the survivors or survivor of them, the death of any who may have died since the last payment, and the survivorship of the rest, must be proved, before payment will be made.¹

A fund payable to the Crown will be ordered to be paid to such persons as the sovereign may, by sign-manual, appoint.²

A fund payable to a married woman, as the personal representative of a deceased person, will be directed to be paid to her as such personal representative; but her husband will be required also to sign the Accountant-General's book.³

A fund belonging to a corporation aggregate will be ordered to be paid to any person named in the petition, if the petition is sealed with the common seal; and no power of attorney or verification of the seal is necessary.⁴ If there is any officer of the corporation to whom the fund is properly payable, it will be ordered to be paid to such officer for the time being, on proof by affidavit that he sustains that character.⁵

As a general rule, the Court will not make an order for the payment out of a fund to any other person than the person or persons entitled thereto. Where, however, the fund is small in amount, or has to be divided amongst so many that the share of each would be small, and consequently the expense attendant upon each separate receipt would be important, the Court will order payment to the solicitor having the conduct of the proceedings, or to one of the parties, upon his undertaking to distribute the fund among the persons entitled;⁶ but a written authority, signed by the persons interested, must be produced stating that they consent to the fund

1 *Seton*, 69; and see *Jefferys v. Smith*, 11 W. R. 479, V. C. K.: *Re Clinton*, 6 Jur. N.S. 601, 8 W. R. 492, V. C. W.; *Bradford v. Nettleship*, 10 W. R. 264, V. C. S., where mortgage money was, on their petition, directed to be paid out of Court to the mortgagees, or one of them, though trustees only of the fund. For form of order, see *Seton*, 67, No. 2; and see *Ex parte Shrevesbury Hospital*, 9 Hare, App. 45.

2 *Tomkins v. Lane*, 2 W. R. 340, V. C. S. 3 *Seton*, 662; see *post*.

4 *Ex parte London & Chatham Railway Company*, 8 W. R. 636, V. C. W.; *Re Dartmouth & Torbay Railway Company*, 9 W. R. 609, V. C. K.; *Seton*, 1974.

5 *Seton*, 70. For form of order, see *ib.* 68, No. 5.

6 For form of order, see *Seton*, 142, No. 4.

being so paid;¹ and the signatures to the authority should be verified by affidavit.² In the case of persons out of the jurisdiction, this last requirement has however been dispensed with.³ If the amount payable to each person exceeds 10*l.*, such an order will be refused, except under very special circumstances.⁴

Where a regular power of attorney, authorising a particular person specifically to receive the fund in question, has been duly executed, the Court will, however large the amount, upon proof of the due execution of the power, and that the same is still in force, order payment to the person so authorised.⁵ In such a case, perhaps, strictly, the application ought to be by the attorney, as well as by the party.⁶

A general written authority by a party out of the jurisdiction to a solicitor in England, to take any proceedings in a suit in Chancery that might become necessary for obtaining, out of Court, his share of the fund in the suit, was held not to entitle the solicitor to apply by petition for payment of the share to him; but a general written authority, by a foreigner and his wife resident abroad, to a solicitor in this country, to take all necessary measures for obtaining payment to the wife of a legacy, which had been paid into Court under the Legacy Duty Act, was held, upon the petition of the husband and wife, to authorise payment to the solicitor.⁸

A power of attorney, or other written authority is necessary to authorize the payment of money out of Court to the solicitor, even though the parties to whom it is coming are numerous and not resident in America. The additional circumstance of

1 *Brandling v. Humble*, Jac. 48; *Kelsall v. Minton*, 2 Beav. 361; *Armstrong v. Stockham*, 11 Jur. 97, V. C. K. B.; *Bear v. Smith*, 5 De G. & S. 92; *Anon.*, 5 Jur. N. S. 385, V. C. W.; *Thomas v. Jones*, 1 Dr. & Sm. 134.

2 *Downing v. Picken*, Kay, App. 1.

3 *Staines v. Giffard*, 20 Beav. 494. Where a fund only amounted to 35*l.*, the Court, on the solicitor personally undertaking duly to apply it, dispensed with the verification of the signature of a foreign notary, before whom an affidavit had been sworn abroad; *Mayne v. Butler*, 13 W. R. 123, V. C. K.; and see *ante*.

4 *Brandling v. Humble*, Jac. 48; *Hawkins v. Dod*, 1 Hare, 146; *Re Morrison*, 16 Sim. 42; *Middleton v. Younger*, 17 Jur. 664, V. C. W.

5 *Hill v. Chapman*, 11 Ves. 289; *Bailey v. Collett*, 18 Beav. 179; *Ex parte De Beaumont*, 13 Jur. 354, V. C. E.; see also *Kiddill v. Farnell*, 3 Sm. & G. 428; 3 Jur. N. S. 786; and 22 & 23 Vic. ch. 35, sec. 26. For a case where payment was ordered to a person holding a general power of attorney, see *Carr v. Eastbrook*, 2 Cox. 390.

6 *Fell v. Jones*, 17 Beav. 521.

7 *Waddilove v. Taylor*, 13 Jur. 1023, V. C. Wigram.

8 *Ex parte De Beaumont*, *ib.* 354, V. C. E.

the money having been realized from the sale of property mortgaged to secure negotiable debentures, which were in the possession of the solicitor since the institution of the suit, was held not to dispense with the necessity of a power of attorney.¹

A fund in Court which has been produced by the sale of a settled estate may be ordered to be paid out to a tenant in tail, without his being required to execute a disentailing deed previously:² he must, however, make an affidavit that there are no incumbrances.³ In like manner, a fund in Court representing the real estate of a married woman may be paid out, without her executing an acknowledged deed.⁴

A fund will not be ordered to be paid out to an administrator *ad litem*.⁵

Where a person entitled to a sum not exceeding 20*l.* had died intestate, it was ordered to be paid out to the person who would have been entitled to take out letters of administration, without requiring them to have been actually granted.⁶

Under special circumstances, an infant's legacy of small amount has been ordered to be paid to its father.⁷

An order for the payment or transfer of a fund out of Court should always be entitled in the cause or matter to the credit of which the fund stands; and the title of the cause or matter, and the account, as stated or referred to in the order, must agree with the Registrar's certificate.⁸

A fund may be ordered to be transferred from one cause to another, upon a petition or motion entitled only in the former

1 *Swan v. Marmora Iron Works*, 2 Cham. Rep. 155.

2 *Re Stewart*, 1 Sm. & G. 32; *Souvy v. Souvy*, 6 Jur. N. S. 337; 8 W. R. 339, V. C. S.; *Re South Eastern Railway Company*, 30 Beav. 215; *Re Holden*, 1 H. & M. 445; *Re Holden*, 10 Jur. N. S. 308, V. C. S.; *Nottley v. Palmer*, 11 Jur. N. S. 968; 14 W. R. 170, V. C. K. In *Re Watson*, 10 Jur. N. S. 1011, although the Lords Justices made the order, they expressed some doubts whether the practice was consistent with the Fines and Recoveries Abolition Act (3 & 4 Will. IV. ch. 74); see also *Re Tylden*, 9 Jur. N. S. 942; 11 W. R. 869, V. C. K.; and *ante*.

3 *Thornhill v. Milbank*, 12 W. R. 523, V. C. K.; and see Ord. XXXIV. 3; and form of order, *Seton*, 524, No. 6.

4 *Re Ellison*, 2 Y. & C. Ex. 528; *Re Worthington*, *Seton*, 1079; *Re Hayes*, 9 W. R. 769, V. C. K.; *Pollack v. Birmingham, Wolverhampton & Stour Valley Railway Company*, *Re Clarke*, 11 Jur. N. S. 7; 13 W. R. 401, V. C. S.; and *ante*.

5 *Williams v. Allen*, 32 Beav. 650; *ante*.

6 *Collendar v. Teasdale*, 3 W. R. 289, V. C. K.; *King v. Isaacson*, 9 W. R. 369, V. C. S.; *Re Cabcl*, 3 W. R. 280, L.J.J.; *Hinings v. Hinings*, 2 H. & M. 32.

7 *Walsh v. Walsh*, 1 Drew/64. 8 *Seton*, 73; and see *ante*.

cause.¹ An order to pay over a fund to certain persons who are named therein, is incidentally a determination that other persons who are not named are not entitled.²

It will be convenient here to introduce the orders relating to the payment of moneys out of Court, as well as those regulating the practice in the office of the Registrar. It is substantially the same as the English practice. Order 355 provides that "Money is to be paid out of Court upon the joint cheque of the Registrar and Ledger Clerk, countersigned by one of the Judges, and not otherwise."

Order 356, that "The person entitled to a cheque is to produce and leave with the Ledger Clerk, the orders and reports entitling such persons to the money, and is to file a *præcipe* in the form set out in Schedule O." Order 357 that "If the Ledger Clerk finds the party entitled as mentioned in the *præcipe*, he is to prepare and sign the cheque; and he is then to attend the Registrar with the cheque and the necessary papers; and the Registrar, after examining the papers, and verifying the party's right to the cheque is to add his signature, after which the same is to be countersigned by a Judge." Order 358 that "The orders and reports, produced as aforesaid, are to be re-delivered to the party entitled thereto, with the cheque."

Order 359 points out the various books to be kept. It provides that "The following Account Books are to be kept, relating to money in Court, or invested under the authority of the Court:

- "I. A Book of Directions to the Bank to receive money.
- "II. A Book of Cheques.
- "III. A money Journal.
- "IV. A money Ledger.
- "V. A Stock Journal.
- "VI. A Stock Ledger.
- "VII. A Balance Book.
- "VIII. A Book as to the Mortgages and Investments, other than Dominion Stock, made under the authority of the Court."

¹ *Weeding v. Weeding*, 1 J. & H. 424.

² *Sheppard v. Sheppard*, 33 Beav. 129.

Order 360 provides that "The Book of Directions, and the Book of Cheques are respectively to be in the same form as hitherto, or in such form as the Judges from time to time direct or approve. The Cheques are to specify in the body thereof the amount of interest, if any, payable therewith; and the directions and cheques are respectively to be numbered consecutively." Order 361, that "The Money Journal is to show the sums paid into and out of Court from day to day; and is to be so arranged and kept that at the foot of each page will appear the total amount in the Bank assuming all cheques to have been presented."

Where money has been paid into Court, as and for the price or value of land required by a Railway Company, the Court will not upon *ex parte* motion, order it to be returned to the company.¹

¹ *Re O. S. & H. R. W. Co., & Cotton*, 4 Grant, 101.

CHAPTER XLV.

PRODUCTION OF DOCUMENTS.

It is the practice of the Court of Chancery to allow a party to apply before the hearing of a suit, for the production of documents, relevant to the matters in question, which are in the possession or power of the opposite party. This power to order the production of documents arises out of that general jurisdiction for the purpose of discovery which, in all proceedings in Equity, constitutes an important feature: and, in some instances, forms, as it were, the very foundation for the interference of the Court. So far as this jurisdiction relates to what is required to be stated fully upon an answer, and to the disclosure of facts within the defendant's knowledge, the subject has been already discussed; ¹ but it still remains to inquire, briefly, into such principles relative to discovery as may serve to explain the right to inspect deeds and writings, and the rules of practice regulating applications for their production.

As the plaintiff's privilege to apply for the production of documents is a part of his general right to discovery, it may be convenient to state the proposition in which this right is accurately expressed. According to Sir James Wigram, in his Treatise upon the subject: "It is the right, as a general rule, of a plaintiff in Equity to exact from the defendant a discovery, upon oath, as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."² It is obvious, from the terms in which this proposition is worded, that the right to discovery is not unlimited. In order to explain fully the extent to which it applies, it is necessary to investigate, what, upon any

¹ *Ante*.

² *Wigram on Disc.*, p. 46, *et seq.*; see also *Attorney-General v. Thompson* 8 Hare, 108.

given state of the pleadings, are material facts to the plaintiff's case about to come on for trial; when a fact may be said to be well pleaded; and what the defendant, in every case, admits by his form of pleading? Many of these subjects have been discussed in former parts of this Treatise;¹ and will be found fully explained in Sir James Wigram's work upon the subject. It is sufficient here to state, that the general principles relative to discovery apply, as well to applications for the production of documents, as to the direct disclosure of facts by an answer.

The right of the plaintiff to obtain a knowledge of the contents of documents in the defendant's possession was formerly exercised by the bill being so framed as to call upon the defendant to set forth the short contents of the deeds in question, or to produce them. If, then, upon the coming in of the answer, the defendant admitted the possession of certain deeds, and described them so that they could be identified, the Court, unless sufficient disclosure had been made of their contents by the answer, would have ordered them to be produced.² The expense of setting out the contents of a deed in the answer in some respects modified this practice; and it became the custom for the plaintiff to charge generally in his bill, that the defendant had deeds and documents relating to the matters in question in his possession. Upon this charge, interrogatories more or less searching, according to the nature of the case, were usually founded: so as to extort from the defendant a clear admission of the possession of the required documents; and if such an admission were obtained, it became competent for the plaintiff to apply for an order that the defendant might produce the required documents.³

The present practice, however, is different. Order 184 provides that "The plaintiff or defendant may at any time after answer, or when the application is on behalf of the plaintiff, after the time for answering has expired, obtained an order of course upon *præcipe* requiring the adverse party to produce, within ten days after the

¹ See *ante*.

² *Atkins v. Wright*, 14 Ves. 211, 213; Lord Eldon, in *Princeps of Wales v. Earl of Liverpool*, 1 Swanst. 123; and see *Somerville v. Mackay*, 16 Ves. 382, 387; *Unsworth v. Woodcock*, 3 Madd. 432.

³ *Bettison v. Farrington*, 3 P. Wms. 363; *Tyler v. Deayton*, 2 S. & S. 309; *Evans v. Richard*, 1 Swanst. 7.

service thereof, all deeds, papers, writings and documents in his custody or power, relating to the matters in question in the cause under oath, and to deposit the same with the clerk of Records and Writs, or a Deputy Registrar of the Court, for the usual purposes." Order 136, that "The order shall not require personal service. If the party required to obey the same has a solicitor, it is to be sufficient to serve the same upon the solicitor." And Order 135 that "Neither plaintiff nor defendant is to be bound to produce, in pursuance of such order, any deed, paper, writing, or document which a defendant, admitting the same by his answer to be in his custody or power, would not be bound to produce."

An order obtained by a defendant before he has filed his answer, unless by special leave of the Court, is irregular and will be discharged. When a demurrer has been filed, the plaintiff is not entitled to an order to produce, pending the argument of the demurrer.¹ A note disputing the amount claimed as due, filed in a mortgage suit, is not an answer and does not entitle the defendant to an order of course for production by the plaintiff.² The orders just referred to are in substance similar to the Order of 31st May, 1850, referred to in *Nichol v. Elliott*, where it was held that whatever discovery a defendant would have been bound to give by answer with respect to documents in his possession, must now (1852) be furnished by the affidavit, in answer to a motion, to compel production under the 31st Order of May, 1850: and the ground upon which he relies to excuse non-production must be stated with the same particularity. When, therefore, a party filed a bill claiming title as heir-at-law of an intestate, and called upon the defendant to produce deeds, &c., and in answer to a motion to compel production the defendant put in an affidavit stating that the deeds in his possession did not prove the plaintiff's title, without furnishing any description so as to enable the Court to judge of the effect proper to be given to this general allegation, such affidavit was held not to be sufficient, and the production of the documents was ordered.³ As a general rule, a plaintiff in Equity, is entitled to a discovery not only of that which constitutes his own title, but also of whatever is

¹ *Reid v. Baldwin*, V. C. Esten, 22 August, 1861.

² *Richardson v. Beaupre*, 2 Cham. Rep. 54.

³ *Nichol v. Elliot*, 3 Grant, 534.

material to repel the case set up by the defendant; and as a part of that discovery, to the production of such documents as are material for the same purpose. Where, therefore, a bill was filed by a person claiming under a devisee, and in opposition to a motion to compel the production of deeds the defendant swore that the alleged testator had not made any valid will, it being sworn that he was not of sound mind when the supposed will was executed, the Court ordered the deeds to be produced.¹

A plaintiff filed a bill against his assignee's representative for an account charging that certain mortgages then in his possession, and apparently belonging to the assignee's estate, in reality were part of his estate. On being served with the usual order for production of documents, the plaintiff filed an affidavit objecting to produce the mortgages, on the ground that they were held by the assignee, the plaintiff's trustee, and that he had a lien on them for moneys expended by him on account of the properties covered by them. The affidavit also described certain other documents in the plaintiff's possession generally. The answer denied, on information and belief, that the mortgages had ever been the property of the plaintiff. Upon the application of the defendant an order was granted requiring production of the mortgages, and for a more particular affidavit.²

Three members of a vestry being appointed a building committee, and by it, one of the three, treasurer thereof: the treasurer being a sub-agent cannot be compelled, in a suit by a member of the vestry, on behalf of himself and all other members except such treasurer, who was the defendant, to produce papers in his hands as treasurer, the other members of the committee being necessary parties—*Seemle*, where a defendant admits in his answer, the possession of documents, and in answer to an order to produce files an affidavit excusing production, the answer and affidavit must be read together.³

It is, therefore, no longer necessary that the defendant should admit the possession of documents in his answer, before production can be obtained: and, although production can still be

¹ *Lawlor v. Murchison*, 3 Grant, 553.

² *Rhodes v. Nield*, 1 Cham. Rep. 131.

³ *Manning v. Cubitt*, 1 Cham. Rep. 177

obtained on an admission in the answer, exceptions thereto, on the ground that the defendant has not fully answered the interrogatory as to documents, will be discouraged.¹

Where discovery from the plaintiff, either concerning matters of fact, or the contents of documents, was necessary to a defendant for the purpose of enabling him to complete his defence to the case sought to be established against him, he could, in general, only obtain such discovery by means of a cross bill.² Upon such a bill being filed, the plaintiff in the original suit, in his character of defendant to the cross bill, became liable to the application of the same rules, concerning the production of documents, as a defendant in any other case. An answer to a cross bill cannot, however, in general be obtained until the original bill has been fully answered; and, not only must a full answer in the ordinary sense of the term be placed upon the record, before an answer to the cross bill can be enforced, but the plaintiff in the original suit will be allowed time to answer the cross bill until after the defendant has complied with an order for production of deeds made in the original suit.³

It will be borne in mind that this practice is altered; for Order 126 provides that a defendant may claim by answer any relief against the plaintiff, which such defendant might claim by a cross bill.

The affidavit, on production, is a substitute for discovery on interrogatories; and a party is entitled to such discovery up to the latest possible date. Where an affidavit has been sworn, before the service of an order to produce, it was *held* to be irregular and insufficient, and a new and better affidavit ordered to be filed.⁴ Under an order to produce, taken out by one defendant, other defendants have no right to compel production or inspection. A motion for a further affidavit by a defendant, under such circumstances, was dismissed with costs.⁵

1 *Rochdale Canal Company v. King*, 15 Beav. 11 : 9 Hare, App. 49, n. ; *Law v. London Indisputable Company*, 10 Hare, App. 20 ; *Barnard v. Hunter*, 1 Jur. N. S. 1066, V. C. S. ; *Kidger v. Worswick*, 5 Jur. N. S. 87, V. C. W. ; *Piffard v. Beeby*, 1 W. N. 18 : 14 W. R. 303, V. C. K. ; but see *Hudson v. Grenfell*, 3 Giff. 398 : 8 Jur. N. S. 87a.

2 See *Potter v. Potter*, 3 Atk. 719 ; *Pickering v. Rigby*, 18 Ves. 484 ; *Princess of Wales v. Lord Liverpool*, 1 Swanst. 114, 123 ; *City of London v. Tomson*, 3 Swanst. 266, n. (b) ; *Nicklethwait v. Moore*, 3 Mer. 292, 296 ; *Shepherd v. Morris*, 1 Beav. 175 : 3 Jur. 164 ; *Taylor v. Heming*, 4 Beav. 285 : 5 Jur. 766 ; *Bate v. Bate*, 7 Beav. 523, 537 : 8 Jur. 232 ; *ante*.

3 *Holmes v. Baddeley*, 7 Beav. 69 ; and see *Taylor v. Heming*, 4 Beav. 235 : 5 Jur. 766.

4 *Kennedy v. Royal Insurance Company*, 3 Cham. Rep. 489.

5 *Seymour v. Longworth*, 3 Cham. Rep. 112.

Where production is sought from a corporation aggregate, the affidavit is to be made by their clerk or secretary, or some other officer acquainted with their documents.¹ Where the clerk of a company, who was made a defendant, as such, for purposes of discovery, swore that the documents were in the custody of the governing body of the corporation, and were not accessible without their leave, but did not state that leave had been refused him, the affidavit was held to be insufficient.

A defendant may, if the Court thinks fit, be required to make an affidavit as to documents, although he has already set them out in his answer.² An order to produce cannot regularly be taken out after decree. An order so taken out on *præcipe* was, on motion, set aside with costs.³

The applicant will not be prejudiced by delay in making the application ;⁴ and his own statement of his case will be assumed to be true for the purposes of it.⁵

Order 137 provides that "The affidavit to be made by the party who has been served with the order may be in the form or to the effect set forth in schedule G., hereunder written."

This form should be adhered to, and only varied in so far as may be necessary to meet the circumstances of the case.⁶ All the plaintiffs required by the order to make the affidavit must, as a general rule, join in it.⁷

Any objections or reasons against the production should be clearly and distinctly stated in the answer or affidavit ;⁸ which must also describe the documents with sufficient distinctness to enable the Court to order production, if the objections should be overruled ;⁹

1 *Seton*, 1048 ; and see *Law v. London Indisputable Company*, 10 Hare, App. 20 ; *Ranger v. Great Western Railway Company*, 4 De G. & J. 74 : 5 Jur. N. S. 1191.

2 *Hanslip v. Kitten*, 1 De G. J. & S. 440 : 9 Jur. N. S. 432.

3 *Cottle v. Fansittart*, 3 Cham. Rep. 396.

4 *Rochdale Canal Company v. King*, 15 Beav. 11 : 9 Hare, App. 49, n. ; *Parkinson v. Chambers*, 1 K. & J. 72 : but see *Duke of Beaufort v. Taylor*, 2 Hare, 245.

5 *Gresley v. Mousley*, 2 K. & J. 288 : 2 Jur. N. S. 156.

6 *Rochdale Canal Company v. King*, 15 Beav. 11 ; *Mansell v. Feeney* (No. 2), 2 J. & H. 320, 323 ; *Woodhatch v. Freeland*, 11 W. R. 398, V. C. K. ; *Blozam*, 46.

7 *Walker v. Kennedy*, 5 W. R. 398, V. C. K.

8 *Rochdale Canal Company v. King*, *ubi sup.* ; and see *Hardman v. Ellames*, 2 M. & K. 732, 745 ; *Blozam*, 46.

9 *Lazarus v. Mozley*, 5 Jur. N. S. 1119, V. C. S. ; and see *Atkyns v. Wright*, 14 Ves. 213.

and the affidavit must be made, although the defendant has good reasons against the production.¹

A notice of motion for an order absolute for non-production in the Registrar's office, under Order 31, of 6th February, 1865, requires personal service by analogy to the former practice by order *nisi*.² Where a party admits documents to be in his possession he is *prima facie* bound to produce them, or assign a sufficient reason why he should not. But where a party refers in his bill to documents which otherwise he would not be liable to produce, he does not by so doing create a liability to produce them.³

Where books were in actual use by defendant, the court refused to order him to make verified copies of entries relative to matters in question for use of plaintiff, but where it was sworn on the part of the plaintiff, and not denied by the defendant, that the latter had documents so relating, which were not mentioned in his affidavit, he was ordered to produce them.

Where a bank agent refused to produce on the ground that he had no documents in his possession but as such bank agent it was held, that he ought to set out in his affidavit what documents were so in his possession. And it appearing from his answer that he had taken a conveyance to himself as trustee for the bank, and that he had certain documents not mentioned in his affidavit, he was ordered to produce them, although the bank was not a party to the cause.⁴

Where the plaintiff had given a mortgage on a steamboat, and the mortgagee afterwards sold the vessel, and the question was whether he was to be charged with the amount of the purchase money, or merely with certain securities received on the sale in lieu of such amount, the defendant, (the mortgagee's executor), admitted the possession of a copy of a letter from the mortgagee, refusing to join in a sale, and of an opinion of counsel relating to the same matter, but alleged that these documents did "not relate to the plaintiff's title, or the case made by the bill, *Held*, that the

1 *Rumbold v. Forteath*, 3 K. & J. 44; *Lazarus v. Mozley*, 5 Jur. N. S. 1119, V. C. S.; *Quin v. Ratcliff*, 6 Jur. N. S. 1327; 9 W. R. 65 V. C. S.; *Seton*, 1047.

2 *Dickson v. Dickson*, 1 Cham. Rep. 366. But by Order 298, of the Con. G. O., service of the notice of motion on the soliditor is sufficient.

3 *Green v. Amey*, 2 Cham. Rep. 138.

4 *Macdonell v. McKay*, *Ibid.* 141

plaintiff was entitled to production, as the plaintiff's case and that of the defendant were so interwoven and inseparably connected, that nothing could relate to one without also relating to the other.¹

Where a conveyance is produced upon notice, by an adverse party, who claims an interest in the cause under the deed so produced, the party calling for its production is not bound to prove its execution.²

In a case between vendor and purchaser, where a defendant who was called on to produce a certain letter, which he refused to produce on the grounds "that the same is and contains an opinion from the said Magrath, who was then acting as my counsel and solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my solicitor, relative to the said title." *Held*, a privileged communication, and a motion to commit for non-compliance with a notice to produce was refused with costs.³

Letters passing between agents of a party to the cause, although written as between themselves in confidence, are not privileged communications, or protected from discovery. Such letters are considered in the custody or power of the party in whose interest they are written and must be produced. Such party cannot withhold part of their contents by cutting out portions of the letter.⁴

A party called on to produce documents must state distinctly in his affidavit on production, what are the documents he seeks to protect, and the grounds on which he claims them to be privileged.⁵

If required, an extension of the time for making the affidavit may be obtained upon motion at Chambers: which must be served on the party seeking production.

The party ordered to make the affidavit must seek the necessary information from his present or former agents.⁶ A statement as

¹ *Hamilton v. Street*, 1 Grant, 327.

³ *Wilson v. Brunskill*, 2 Cham. Rep. 147.

⁵ *Wright v. Western Insurance Company*, 2 Cham. Rep. 408.

⁶ *Earl of Glengall v. Frazer*, 2 Hare, 99; *McIntosh v. Great Western Railway*, 4 De G. & S. 544; and see *Gabbett v. Cavendish*, 3 Swanst. 287, n.

² *Chisholm v. Sheldon*, 2 Grant, 178.

⁴ *Wiman v. Bradstreet*, *ibid.* 77.

to the purport and effect of the documents, made on the faith of information received from other persons, will not protect them from production.¹

Where the party filing the answer or affidavit claims thereby to protect documents from production, and the opposite party considers he is entitled to have them produced, the proper mode of raising the question is by notice of motion for their production, and not, in the case of an affidavit, by a motion to consider the sufficiency of the affidavit.² On hearing of the application, the Judge will, if necessary, inspect the documents himself, and determine whether any of them should be produced.³

If the affidavit is considered to be informal, or insufficient, from any cause: such as, not containing a clear admission or denial of the possession of documents; or such a description of them that the Court can enforce its order: a further motion to consider the sufficiency of the affidavit should be made; and if the affidavit is held to be informal or insufficient, the party seeking production may obtain at Chambers an order, expressing that the Judge is of opinion that the affidavit is insufficient;⁴ and upon production of such order to the Record and Writ Clerk, together with the order directing the affidavit to be made, and an affidavit of due service thereof, before the affidavit as to documents was filed, he will seal an attachment or other process for disobedience to the order, as if no affidavit had been filed.⁵ It is usual, however, for the Judge, on holding an affidavit to be insufficient, to give the deponent a few days' further time to file a full and sufficient affidavit: in which case, a clause to that effect is inserted in the order;⁶ and such time may be further extended, on his special application by motion. Where time is thus given, process of contempt cannot be issued till such time has expired; nor, if the deponent files a further affidavit

¹ *Manby v. Beuicks* (No. 3), 8 De G. M. & G. 476: 2 Jur. N. S. 671.

² *Nicholl v. Jones*, 13 W. R. 451, V. C. W.

³ For form of order in such case, see *Seton*, 1042, No. 8.

⁴ The order need not be served. For form of order, see *Seton*, 1043, No. 10.

⁵ Where the order directing the affidavit to be made has not been duly served, the further order holding the affidavit to be insufficient should also repeat the directions of the former order as to filing a full and sufficient affidavit, and depositing the documents in Court, within a limited time, or directing their production out of Court; and must, in such case, be indorsed, served, and disobeyed, and an affidavit of such service and disobedience be produced to the Record and Writ Clerk, before process of contempt can be issued.

⁶ See *Seton*, 1043, No. 10.

till the insufficiency thereof has been determined by the Judge. Where a further affidavit is filed, the same course may be repeated till a sufficient affidavit is made; but where the Judge is of opinion that the deponent is willfully evading the order, he may refuse him further time, and thereby leave him in peril of process of contempt for his disobedience.

The party from whom production is sought cannot be cross-examined on his affidavit or answer;¹ and no other evidence as to his possession of the documents can be received:² although it is suggested that a document has been fraudulently omitted from the schedule;³ but he may be required to make a further affidavit, stating specifically whether he has or has had a particular document in his possession, and what he has done with it.⁴

Our practice is different. Order 140 provides for the examination of a party, either plaintiff or defendant, at any time after answer, and before and at the hearing. And Order 268 provides for the cross-examination of any person who has made an affidavit in the cause. These orders are fully set out in the chapter on motions and petitions, *ante*.

Where the application is founded on an answer, which, taken by itself, would have shown a sufficient admission of possession, the party has been permitted to show by affidavit that the documents in question are so circumstanced as not to be in his possession, custody, or power,⁵ or that the required documents come within some of the special grounds of exemption.⁶

The party ordered to produce the documents may conceal, by sealing up, such portions of the documents as he may by his affidavit

1 *Manby v. Beuicke*, (No. 2), 8 De G. M. & G. 470; 2 Jur. N. S. 672: overruling *Kay v. Smith*, 3 W. R. 622, L.J.J.; 20 Beav. 567.

2 *Addis v. Campbell*, 1 Beav. 258, 261; *Edwards v. Jones*, 1 Phil. 501; *Lamb v. Orton*, 1 Drew. 414; *Richards v. Watkins*, 6 Jur. N. S. 168, V. C. W.; and see *Mansell v. Feeney*, (No. 2), 2 J. & H. 320.

3 *Reynell v. Sprye*, 1 De G. M. & G. 656; 15 Jur. 1046.

4 *Richards v. Watkins*, 6 Jur. N. S. 168, V. C. W.; *Willett v. Thistleton*, 1 N. R. 52, M. R.; *Noel v. Noel*, 1 De G. J. & S. 468; 9 Jur. N. S. 589; *Westminster & Brymbo Colliery Company v. Clayton*, 12 W. R. 123, V. C. W.

5 *Morrice v. Swaby*, 2 Beav. 500; *Smith v. Massie*, 4 Beav. 417; *Gardner v. Dangersfield*, 5 Beav. 389; *Burbridge v. Robinson*, 2 McN. & G. 244.

6 *Tyler v. Drayton*, 2 S. & S. 309, 311; *Hughes v. Biddulph*, 4 Russ. 190; *Parsons v. Robertson*, 2 Keen, 605; *Llewellyn v. Badeley*, 1 Hare, 527, 530; 6 Jur. 705; *Curd v. Curd*, 1 Hare, 274; 6 Jur. 307, L.C.; *Blenkinsop v. Blenkinsop*, 10 Beav. 143.

swear to be privileged from production;¹ and the order for production will, on his application, be qualified in this manner, as well where it is founded on an answer,² as where it is not. Where the right to seal up is admitted to be claimed in this manner, a special application for leave to seal up may be made by motion.³ In a case of this kind, even though there are strong grounds for suspecting that the party has sealed up matter that ought to have been disclosed, the Court is concluded by the oath of the party from giving further discovery.⁴ If, however, his affidavit contains statements at variance with each other, or if the document itself shows a discrepancy in his statements, it seems that it would be quite consistent with the rules of the Court to get at the truth, by compelling him to give discovery;⁵ and in such a case, the Court will, if necessary unseal the documents and examine them, in order to see whether the applicant is entitled to inspect the portions sealed up.⁶

A defendant cannot compel the production of documents by the next friend of the plaintiff;⁷ nor can he, before decree, obtain the production of documents in the possession of a co-defendant;⁸ although, after decree, he may do so.⁹

Where the defendant to an information requires the production of documents in the possession of the relators, he must apply to the Attorney-General.¹⁰

The course of procedure for obtaining the production of documents after the hearing, is the same as that already described for obtaining their production before the hearing; and a party who has made a full discovery of documents before the hearing, may be ordered to make a further discovery after the hearing.¹¹

1 *Gerard v. Penswick*, 1 Swanst. 638; *Curd v. Curd*, 1 Hare. 274; 6 Jur. 307, L. C.; *Mansell v. Feeney*, (No. 2) 2 J. & H. 320; *Talbot v. Marshfield*, 1 Law. Rep. Eq. 6; 11 Jur. N. S. 901, V. C. K.

2 *Ibid.* For form of order, see *Seton*, 1040, No. 2.

3 *Talbot v. Marshfield*, 1 Law Eq. 6. For form of order, see *Seton*, 1043, No. 9.

4 *Sheffield Canal Company v. Sheffield and Rotherham Railway Company*, 1 Phill. 484.

5 *Boset v. Fernie*, 3 M. & C. 683; *Greenwood v. Greenwood*, 6 W. R. 119, V. C. K.; and see *Wadman v. Brimble Colliery Company v. Clanton*, 12 W. R. 123, V. C. W.

6 *Caton v. Lewis*, 22 L. J. Ch. 946, M. R.; *Lafone v. Falkland Islands Company*, 27 L. J. Ch. 25, V. C. W.

7 *Hardwick v. Wright*, 11 Jur. N. S. 297; 13 W. R. 560, V. C. S.

8 *Attorney-General v. Clapham*, 10 Hare, App. 68; *Hardwick v. Wright*, 11 Jur. N. S. 297; and see *Wynne v. Humberston*, 27 Beav. 421; 6 Jur. N. S. 6.

9 *Hart v. Montefiore*, 30 Beav. 220; 8 Jur. N. S. 350; *Bowen v. Pearson*, 9 Jur. N. S. 780; 11 W. R. 819, V. C. S.

10 *Attorney-General v. Clapham*, 10 Hare, App. 68, 70; and see *Attorney-General v. Payne*, M. R. in Chambers, 25 March, 1859, Reg. Lib. 1858, A. 1255, where the affidavit was directed to be made by the relators, or one of them, or the informant's solicitor: he consenting.

11 *Hanslip v. Kilton*, 1 De G. J. & S. 440; 9 Jur. N. S. 482.

A claimant coming in under a decree can, in the same manner, obtain production from the parties to the cause of the documents material to his case which are in their possession;¹ and may, conversely, be ordered to produce all the documents in his custody, possession, or power relating to his claim.²

It is not necessary that the documents should be in the actual corporeal possession of the party ordered to produce them: it is sufficient if he has the right to deal with them;³ and, therefore, where they are in the possession of his agent, production will be ordered: the principle of the Court being, that the possession of the agent is the possession of the party himself.⁴ It seems, however, necessary, that the person in whose custody the documents are should hold them exclusively for the party against whom the application is made: for, according to Lord Cottenham, when documents are in the possession of A, B. and C., you cannot order that A. shall produce them; and that for the best possible reason, namely, that he could not produce them;⁵ and, upon the same principle, where the person who holds them is the agent of other persons as well as the party against whom the motion is made, it seems that no order can be made for the production of such documents.⁶ This principle, however, does not extend, so as to exonerate a party from making a discovery, by answer, of any knowledge he may be able to obtain by inspecting documents in the joint possession of himself and others; for a party is bound to inspect, and answer as to the contents of, all documents that are in his possession or power; and all which he has a right to inspect, provided he can enforce that right, are in his power.⁷

The difference between ordering a party to produce a document, in which he has only a joint possession with others, and ordering

1 *Ante*; *Re McVeagh, McVeagh v. Croall*, 1 De G. J. & S. 399: 9 Jur. N. S. 240; and see *Newland v. Steer*, 11 Jur. N. S. 596; 18 W. R. 1014, V. O. K.; *Dent v. Dent*, 1 Law Rep Eq. 186, M. R.

2 *Ante*; *Re Pine, Pine v. Ellis*, M. R. in Chambers, 18 Nov. 1863, Reg. Lib. B. 2287.

3 *Reid v. Langlois*, 1 McN. & G. 627, 636: 14 Jur. 467, 469.

4 *Murray v. Walter*, C. & P. 114, 125: 3 Jur. 719; *Morris v. Swooby*, 2 Beav. 500; *Wright v. Mayer*, 6 Ves. 280, 281; *Fenwick v. Reed*, 1 Mer. 114, 123; *McCann v. Beere*, 1 Hogan, 129; and see *Palmer v. Wright*, 10 Beav. 234; *Colyer v. Colyer*, 9 W. R. 452, V. C. K.; *Bishop of Winchester v. Bowker*, 29 Beav. 479; *Earl of Eglinton v. Lamb*, 12 Jur. N. S. 45: 14 W. R. 170, V. C. K.

5 *Murray v. Walter*, C. & P. 114, 124: 3 Jur. 719; see *Cridland v. Lord de Mauley*, 13 Jur. 442, V. C. K. B.; *Reid v. Langlois*, 1 McN. & G. 627: 14 Jur. 467; *Morrell v. Wootten*, 13 Beav. 105: 15 Jur. 319; *Richards v. Watkins*, 6 Jur. N. S. 168, V. C. W.

6 *Lopez v. Deacon*, 6 Beav. 264, 258; *Airey v. Hall*, 2 De G. & S. 489: 12 Jur. 1043; *Edmonds v. Lord Foley*, 30 Beav. 282: 8 Jur. N. S. 552; see, however, *Walburn v. Ingilby*, 1 M. & K. 61, 78, 79; and the observations of Lord Cottenham thereon, in *Murray v. Walter*, C. & P. 125.

7 *Taylor v. Rundell*, 1 Phill. 222, 226; and see S. C. 11 Sim. 391; 1 Y. & C. C. C. 128; C. & P. 104; *Glyn v. Caulfeild*, 3 McN. & G. 463: 15 Jur. 807; *Penny v. Goode*, 1 Drew. 474.

him to disclose the result of his inspection of documents, which, though not in his exclusive possession, he is still entitled to peruse. has been very clearly pointed out by Lord Cottenham, in the case of *Taylor v. Rundell*.¹ In that case he says: "It is true that the rule of the Court, adopted from necessity, with references to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it; and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to;² the other is, that another party, not present has an interest in the document which the Court cannot deal with. But that rule does not apply to discovery: in which the only question is, whether, as between the plaintiff and the defendant, the plaintiff is entitled to an answer to the question, he asks: for, if he is, the defendant is bound to answer it satisfactorily or, at least, show the Court that he has done so as far as his means of information will permit."³ Where, however, the party has the benefit of a covenant for the production of documents, for the purpose of manifesting his own title, he cannot be compelled to obtain an inspection, and disclose their contents, or obtain their production, in order to establish a claim set up against himself, in a suit to which the covenantor is not a party.⁴

If the exclusive right to the possession is only prevented by the document being retained by any agent or solicitor, the Court will order production by the party: taking care to give him sufficient time to compel the delivery from the person wrongfully retaining it.⁵ The consequence of this rule is, that it is not usually necessary to make a solicitor a party to a suit because he has the title deeds of the party in his possession: although cases may arise to render such a proceeding advisable; as if the solicitor withholds the deeds in his possession, and will not deliver them to his client on his applying for them.⁶ Where the solicitor merely claims the ordinary lien on the documents they must be produced;⁷ and the Court will not, in order to faci-

¹ C. & P. 104; but see *Walburn v. Ingilby*, 1 M. & K. 61, 79.

² *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 123: 1 Wils. 113.

³ C. & C. 111.

⁴ *Bethell v. Casson*, 12 W. R. 200, V. C. W.

⁵ *Taylor v. Rundell*, C. & P. 104, 113: 1 Phil. 292, 225.

⁶ *Fenwick v. Reed*, 1 Mer. 114, 123; see *ante*.

⁷ *Ex parte Shaw*, Jac. 272; *Hope v. Liddell*, 20 Beav. 438; 7 De G. M. & G. 331: 1 Jur. N. S. 685; *Lockett v. Cary*, 10 Jur. N. S. 144, M. R.; and see *Fencott v. Clarke*, 6 Sim. 8.

litate their production, direct the party to pay the costs of the solicitor claiming the lien.¹

Documents not belonging to the party, but alleged to have been lent to him by a person not a party to the suit, have been ordered to be produced. Thus, in a suit for tithes in the Exchequer, the plaintiff was ordered to produce documents in his possession, the property of the vicar, though he was not a party: they being required for the purposes of the examination of the vicar, from whom the plaintiff had obtained them;² and a party has been ordered to produce documents which he has obtained from a third party, and holds subject to an undertaking not to part with their possession;³ but a defendant cannot require the plaintiff to produce a document which has been furnished to him by another defendant, in the absence of the latter defendant: although it seems that, where a covenant has been obtained for a specific limited purpose, production cannot be withheld on the ground of an implied confidence that it will not be used for any other purpose.⁴

In a suit for an account of a partnership between two solicitors, it was held to be no objection to an application for the production of documents that the clients of the firm had an interest in them;⁵ but when the documents were in possession of trustees, production of them was refused in the absence of the *cestuis que trust*.⁶

A party will not be ordered to produce documents, with the possession of which he has parted since the filing of the bill, but before the time of making the application.⁷

The mere circumstance of the documents being abroad, is no answer to an application for their production; but, in such a case, reasonable time will be given the party to bring them to this country; and if he does not comply with the order, the Court will consider it the same as if he had had them here in the first instance and had refused to produce them.⁸

1 *Wroughton v. Barclay*, 11 Jur. 274, V. C. K. B.; see also *Rodick v. Gandell*, 10 Beav. 270; *Burbridge v. Robinson*, 2 McN. & G. 244.

2 *Foreman v. Cooper*, 11 Pri. 515.

3 *Penkethman v. White*, 2 W. R. 380, M. R..

4 *Reynolds v. Godlee*, 4 K. & J. 88.

5 *Brown v. Perkins*, 2 Hare, 540: 8 Jur. 186; see also *Richardson v. Hastings*, 7 Beav. 354.

6 *Ford v. Dolphin*, 1 Drew. 222.

7 *Burbridge v. Robinson*, 2 McN. & G. 244; and see *Penney v. Goodr*, 1 Drew. 474: 17 Jur. 82.

8 *Parquharson v. Balfour* T. & R. 190; *Freeman v. Fairlie*, 3 Mer. 44; and see *ante*.

Where the possession of the documents is admitted, but the party claims to be exempted from producing them on the ground that, under the particular circumstances of the case, he is unable to do so, he must satisfy the Court, by evidence, that he cannot obtain access to them; and a mere statement to that effect in his answer or affidavit is insufficient.¹

Where the application is founded on an answer, the plaintiff must, as a general rule, be able to read from the answer an admission that the documents are in the defendant's possession,² at the time the application is made,³ and that they relate to the contents of the bill as it then stands.⁴ Although the admission must be contained in the answer, a plaintiff has been allowed to verify by affidavit documents, neither admitted nor denied by the answer, which tended to establish the plaintiff's right to production.⁵

The applicant, having shown that the answer contains a sufficient admission of the possession of documents, must also show that they are sufficiently described to enable the Court to specify which are to be produced.⁶

Besides the reasons against the production of documents which have been considered, there are also objections to their production, arising out of the general principles which regulate the right to discovery in Equity.⁷

The general rule is, that when once it is admitted that the documents relate to the matters in question in the suit, they must be produced: unless they manifestly can have no bearing upon the issue. Upon the question of relevancy, the Court accepts the statement on oath of the party against whom production is sought; but it does not accept his assertion upon the point whether they will or will not establish the applicant's case: that question being one upon which the applicant has a right to the opportunity of

1 *Mertens v. Haigh*, 11 W. R. 792, L.J.J.

2 *Darwin v. Clarke*, 8 Ves. 158; *Erskine v. Bize*, 2 Cox, 226.

3 *Heenan v. Midland*, 4 Madd. 391. Where the defendant had died since filing his answer, it was held that a new admission must be procured from his representatives, before production could be obtained against them: *Scott v. Wheeler*, 12 Beav. 866; and see *Robertson v. Shennell*, 15 Beav. 27.

4 *Haverfield v. Pyman*, 2 Phil. 202; and see *Attorney-General v. Thompson*, 8 Hare, 118; *Reynold v. Sprye*, 11 Beav. 618.

5 *Addis v. Campbell*, 1 Beav. 258, 261.

6 See *Atkins v. Wright*, 14 Ves. 213.

7 See *ante*.

judging for himself.¹ The party admitting the relevancy is, therefore, bound to produce the documents, although he denies that they tend to prove the applicant's title,² or he sets up a defence which denies the applicant's whole title.³ This rule has been considered to be impugned, by the decision of Lord Cottenham in *Adams v. Fisher*;⁴ but that case seems to have been decided on the ground that the documents did not appear to be material for the purpose of the decree.⁵

If it clearly appears that the documents, although relevant, are not material to the applicant's case,⁶ or that they are not necessary or material to the question to be decided at the hearing, production will not be ordered; and it may be mentioned here, that if the plaintiff amends his bill, and thereby alters the issue, production will not be ordered upon an admission of relevancy made previously to the amendment.⁸

Orders for production are only made upon two principles: security pending litigation; and discovery for the purposes of the suit; and will, therefore, be refused, where the order would be equivalent to a decree in favour of the plaintiff.⁹ Thus, where the whole object of the suit was, that the plaintiff might be declared entitled to a copy of a certain book for the purposes of his trade, a motion for the production of the book was refused, on the ground that the application sought an anticipated decree.⁹ Where, however, the suit was instituted for the delivery up of certain documents, it was held that it was necessary that they should be produced, for the purpose of ascertaining whether they were of such a character that

1 *Mansell v. Feeney* (No. 2), 2 J. & H. 320; and see *Tyler v. Drayton*, 2 S. & S. 309, 310; *Smith v. Duke of Beaufort*, 1 Hare, 507; Affd. 1 Phill. 209; 7 Jur. 1096; *Attorney-General v. Thompson*, 8 Hare, 106.

2 *Mansell v. Feeney* (No. 2), 2 J. & H. 320.

3 *Wigram on Disc.* 89, *et seq.*; *Shaw v. Ching*, 11 Ves. 303; *Somerville v. Mackay*, 16 Ves. 382; *Unsworth v. Woodcock*, 3 Madd. 432; *Hue v. Richards* 2 Beav. 305, 307; *Edwards v. Jones*, 1 Phill. 501, 506; *Marquis of Bute v. Glamorganshire Canal Company* ib. 681, 685; 9 Jur. 1063; *Ord v. Parcott*, 14 Jur. 456; V. C. Wigram; *Attorney-General v. Corporation of London*, 2 Mc N. & G. 247, 250; 14 Jur. 205; *Goodall v. Little*, 1 Sim. N. S. 155, 161; 15 Jur. 309; *Bugden v. South*, 3 Jur. N. S. 783, M. R.; and see *Rigby v. Rigby*, 15 Sim. 90; 10 Jur. 126.

4 3 M. & C. 526, 546; and see *Turney v. Bayley*, 12 W. R. 633, L.JJ.

5 See observations of Lord Lyndhurst, in *Marquis of Bute v. Glamorganshire Canal Company*, 1 Phill. 681; and in *Lancaster v. Evers*, ib. 352; and of Sir John Romilly, M. R., in *Bishop of Winchester v. Bowker*, 29 Beav. 479.

6 *Smith v. Dowling*, 10 Jur. 63; V. C. E.; *Mollardy v. Hitchcock*, 11 Beav. 73, 77; *Harford v. Rees*, 15 Jur. 663; V. C. Ld. C.; *Mansell v. Feeney* (No. 2), 2 J. & H. 320; *Forbes v. Tanner*, 9 Jur. N. S. 455; 11 W. R. 414; V. C. K.

7 *Turney v. Bayley*, 12 W. R. 633, L.JJ.

8 *Haverfield v. Pymon*, 2 Phill. 202; *Attorney-General v. Thompson*, 8 Hare, 118; *Reynell v. Sprye*, 11 Beav. 618.

9 *Lingen v. Simpson*, 6 Madd. 290.

the plaintiff was entitled to have them delivered up at the hearing of the cause.¹

In suits to set aside deeds or legal instruments, upon the ground of fraud or other equitable circumstances, the plaintiff is not, from reasons founded on the object of the suit alone, entitled to the production of the instrument impeached by the bill:² for if he was, a plaintiff, by merely filing a bill purporting to impeach a deed, might, without more, exact production of it.³ Cases of this class must, it is conceived, be governed by the general rules of the Court, and not by any rules peculiar to the cases themselves. Where the deed sought to be set aside is alleged by the plaintiff to contain on the face of it, evidence of the fraud or other fact upon which it is sought to be set aside, then, unless the defendant, by his answer or affidavit, expressly denies that the deed does exhibit such evidence, it seems that an order will be made for its production.⁴

Another case, in which the plaintiff is not entitled to production of the documents, exists when the required documents are not wanted for the purpose of proving the plaintiff's right to a decree, but for the purpose of carrying into effect the decree sought to be obtained. Cases of this kind must be distinguished from those where the documents are required for a subordinate point in the decree, but still for a point in the decree. In the cases now considered, the discovery is supposed to be, not for the purpose of determining in any respect what the decree is to be, but for the purpose of enabling the plaintiff to carry it into execution. Under these circumstances, there is clearly no reason why the plaintiff should inspect the documents before the hearing of the cause.⁵ The case of *The Attorney-General v. Ellison*,⁶ seems to be somewhat at variance with the foregoing principles. There, the general object of the suit was to set aside two leases; and a motion was made for the production of four deeds, relating to the leases, admit-

1 *Lady Berensford v. Driver*, 14 Beav. 387; and see *Bishop of Winchester v. Bowker*, 29 Beav. 479.

2 *Beckford v. Wildman*, 16 Ves. 438; *Balch v. Symes*, T. & R. 87; *Tyler v. Drayton*, 2 S. & S. 309; *Bawford v. Blakesley*, 6 Beav. 131; *Dendy v. Cross*, 11 Beav. 91.

3 See *Crisp v. Platel*, 8 Beav. 62.

4 *Kennedy v. Green*, 6 Sim. 6; and see *Neate v. Latimer*, 2 Y. & C. Ex. 257; S. C. *nom. Latimer v. Neate*, 11 Bligh, N. S. 112; 4 Cl. & F. 570; and see observations of Lord Cottenham thereon, *Glover v. Hall*, 2 Phill. 484, 490.

5 *Wigram on Disc.* 211; and see *Turney v. Bayley*, 12 W. R. 633, L.JJ.

6 4 Sim. 238.

ted to be in the possession of the defendants, and by the description of them appearing to be assignments of the leases sought to be set aside. Sir Lancelot Shadwell, V. C., ordered production : saying, " If the Attorney-General succeeds, every portion of the legal estate in the terms for 999 years must be assigned or surrendered, so that the leases may be no longer set up ; he, therefore, has a direct interest in the deeds in the defendant's possession. They do not relate solely to any separate and independent title of the defendant, and therefore they must be produced."¹ This case is criticised by Sir James Wigram, upon the ground that the plaintiff could not be entitled to know the contents of the derivative leases, until, by proving his right to rescind the original leases (a purpose for which it was not suggested that the derivative leases could assist him), he had established an interest in the leases also.²

In many cases, the extent of discovery to which a plaintiff, at any particular period of the cause, is entitled, depends upon the state of the pleadings.³ Thus, if a demurer to the whole bill is put in : as such a state of the record in itself is an admission of every fact properly pleaded in the bill : the plaintiff has no right to any discovery ; consequently, no application for the production of documents can be obtained.⁴ So, also, if the defendant pleads a pure affirmative plea—that is, if the defendant admit the whole case made by the bill, but states some fact, not in any manner denied by the bill, as a defence to the whole case—then the plaintiff has no right to discovery.⁵ The effect of the state of the pleadings upon the right to discovery has already been discussed ;⁶ and it need now only be stated that, when discovery as to documents can be compelled, an order for their production can be made.⁷ Where the defendant pleads to part of the bill and answers the remainder, the application for production is often ordered to stand over until the plea is argued.⁸

Another objection to the production of documents is, that they relate exclusively to the case of the party objecting to the produc-

1 4 Sim 241.

2 As to the effect of amendment, see *ante*.

3 See *ante*, and cases collected, *Seton*, 1062.

4 See *ante*, and cases collected, *Seton*, 1054.

5 *Parkinson v. Chambers*, 1 K. & J. 72.

6 *Buchanan v. Hodgson*, 11 Beav. 368.

2 *Wigram*, on Disc. 214.

6 See *ante*.

tion : if they relate to the case of both parties, they must be produced ;¹ but liberty will be given to seal up those parts which do not relate to the common ground.²

If the party against whom production is sought makes no case of his own, but simply denies the applicant's title, he cannot escape production on the ground that the documents only evidence his own case ;³ and the mere use of the word title—the mere allegation that the documents relate exclusively to the title of the party resisting production—is of no avail, if that conclusion is opposed by the character of the documents, or if it is not supported by specific averments excluding all probability that the documents would furnish evidence in support of the applicant's case : in such a case the Court exercises its own judgment as to the effect which the evidence may have.⁴ In order to resist the production of documents which have been obtained for the purposes of the defence to the suit, it must be stated, and must appear, looking at the schedule and the nature of the documents, that they do not relate to or tend to show, not only the title of the plaintiff to the property to be recovered, but the title to the relief prayed by the bill.⁵

The result of the cases on this subject has been thus stated : "If it be, with distinctness and positiveness, stated in an answer that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defence erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter sup-

1 *Ante* ; *Smith v. Duke of Beaufort*, 1 Hare, 507, 520 ; *Affid.* 1 Phill. 209 : 7 Jur. 1095 ; and see *Bolton v. Corporation of Liverpool*, 1 M. & K. 88, 91 ; *Burrell v. Nicholson*, *ib.* 680 ; *Wright v. Vernon*, 1 Drew. 344 ; *Lloyd v. Purves*, 6 W. R. 421, V. C. W. ; *Hunt v. Elmes*, 27 Beav. 62 : 6 Jur. N. S. 646. As to the form of affidavit, see *Manby v. Beuicke*, (No 3), 8 De G. M. & G. 476 : 2 Jur. N. S. 671. As to the right of a disinherited heir at law to production, see *Lady Shaftesbury v. Arrol-Smith*, 4 Ves. 66 ; *Bennett v. Glossop*, 3 Hare, 578 ; *Wright v. Vernon*, 1 Drew. 344 ; *Rumbold v. Fortescue*, 3 K. & J. 44, 748 ; 3 Jur. N. S. 657 ; *Quin v. Ratcliff*, 6 Jur. N. S. 1327 : 9 W. R. 66, V. C. S.

2 *Barp v. Lloyd*, 3 K. & J. 549 ; *Lind v. Bart of Wight Ferry Company*, 3 W. R. 540, V. C. W.

3 *Attorney-General v. Corporation of London*, 3 McN. & G. 247 ; 259 : 14 Jur. 205.

4 *Harris v. Harris*, 4 Hare, 179, 184 : 9 Jur. 80 ; and see *Marquis of Bute v. Glamorganshire Canal Company*, 1 Phill. 681 : 9 Jur. 1063 ; *Prince of Wales v. Lamb*, 11 Beav. 218 ; *Greenwood v. Greenwood*, 6 W. R. 119, V. C. K.

5 *Felkin v. Lord Herbert*, 9 W. R. 756, V. C. K. ; and see *Gandee v. Stansfeld*, 4 De G. & J. 1 : 5 Jur. N. S. 778.

porting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."¹

A mere statement in the answer of a document which the party is not bound to produce,² or a mere reference to a document relating exclusively to the defendant's title,³ will not entitle the applicant to its production; but where a party states the effect of a document relating to his own title, which he has in his possession, and craves leave to refer to it for greater certainty, it has been held that he is bound to produce it.⁴ This decision is criticised by Sir James Wigram, on the ground of the conclusive effect given to the reference in the answer: to the exclusion of those considerations which, in other cases, are of the essence of the question between the parties: namely, the nature of the document, and the case appearing upon the whole record;⁵ and, with reference to it, Lord Cottenham has remarked: "It was certainly no new decision, and I was very much surprised to hear any one treat it as such; and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject. Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases; but the plaintiff is entitled to see whether the defendant has rightly stated it. It is because the defendant chooses to make it part of his answer that the plaintiff

¹ Per Sir J. L. Knight Bruce, V. C., in *Combe v. Corporation of London*, 1 Y. & C. C. C. 651, 651: 6 Jur. 571; see also *S. C.*, before L. C., 10 Jur. 57; and 4 Y. & C. Ex. 139; *Bannatyne v. Leader*, 10 Sim. 230, 235; *Prince of Wales v. Lambe*, 11 Beav. 213; *Attorney-General v. Corporation of London*, 2 McN. & G. 247: 14 Jur. 205; *Stainton v. Chadwick*, 3 McN. & G. 575 584: 15 Jur. 1139; *Cannock v. Jauncey*, 1 Drw. 497; *Smith v. Barnes*, 1 Law Rep. Eq. 65: 11 Jur. N. S. 924, V. C. W.; *Patch v. Ward*, 14 W. R. 186, V. C. S. As to the necessity of distinctness, see *Wanney v. Tempest*, 9 Beav. 407; *Peile v. Stoddart*, 1 McN. & G. 192, 195: 13 Jur. 373; *Hunt v. Elmes*, 27 Beav. 62, 64: 5 Jur. N. S. 645.

² *Glover v. Hall*, 2 Phill. 484.

³ *Atkyns v. Wright*, 14 Ves. 211.

⁴ *Hardman v. Ellames*, 2 M. & K. 745; see also *Bettison v. Farrington*, 3 P. Wms. 364; *Atkyns v. Wright*, 14 Ves. 211, 214; *Boans v. Richard*, 1 Swanst. 7, 8; Lord Eldon in *The Princess of Wales v. The Earl of Liverpool*, 1 Swanst. 114, 121; *Welford v. Stainthorpe*, 2 Beav. 587; *Belahem v. Percival*, 10 Jur. 772, V. C. W.; *McIntosh v. Great Western Railway*, 1 McN. & G. 73: 13 Jur. 179; *Glover v. Hall*, 2 Phill. 484; *Latimer v. Neate*, 11 Bligh, N. S. 112: 4 Cl. & F. 670, and observations of Lord Cottenham thereon, 2 Phill. 480.

⁵ *Wigram on Disc* 302; and see *Howard v. Robinson*, 4 Drew. 522: 5 Jur. N. S. 136.

is entitled to see it : not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence."¹

A further objection to the production of documents arises out of the privilege extended to professional communications. This subject has been already considered with reference to the right of a defendant to demur to discovery sought from him,² or to decline giving it by answer.³ There does not seem to be any difference whether the question arises upon applications for the production of documents, or upon exceptions to an answer, or a demurrer to discovery; and it appears that all letters written, and cases stated for the opinion of counsel, by a party or his solicitor, are privileged from production in any suit respecting the same subject-matter, and involving the question to which such letters and cases relate: although, at the time they were sent or stated, no litigation had arisen, or they were sent or stated with reference to a previous litigation between other persons relating to the same subject-matter.⁴ Where the client and solicitor were both defendants, and the solicitor claimed the privilege but the client did not object to the production, the documents were ordered to be produced.⁵

Cases and letters in which the plaintiff and defendant are jointly interested must be produced,⁶ and so, in a suit by a *cestui que trust* must cases and opinions taken by the trustee for his guidance in the administration of the trust, and not for the purpose of his own

1 *Adams v. Fisher*, 3 M. & C. 526, 548; see also *McIntosh v. Great Western Railway*, 1 McN. & G. 73: 13 Jur. 179.

2 *Ante*.

3 *Ante*.

4 *Bolton v. Corporation of Liverpool*, 1 M. & K. 88, 91; *Greenough v. Gaskell*, *ib.* 98, 101; *Flight v. Robinson*, 8 Beav. 22, 33: 8 Jur. 888; *Reece v. Trye*, 9 Beav. 31; *Calley v. Richards*, 19 Beav. 401; *Combe v. Corporation of London*, 1 Y. & C. C. C. 631: 6 Jur. 571; *Clagett v. Phillips*, 2 Y. & C. C. 82: 7 Jur. 31; *Lord Watlington v. Goodricke*, 3 Hare, 122, 124; *R. v. Well v. Jackson*, 9 Hare, 387; *Herring v. Cloberry*, 1 Phil. 91; *Holmes v. Baddeley*, *ib.* 476, 480: 9 Jur. 289; *Pearse v. Pearse*, 1 De G. & S. 12, 18; *Glyn v. Caulfield*, 3 McN. & G. 463, 471: 15 Jur. 807; *Hawkins v. Gathercole*, 1 Sim. N. S. 150: 15 Jur. 180; *Enthoven v. Cobb*, 2 De G. M. & G. 622: 17 Jur. 81; *Thompson v. Falk*, 1 Drew. 21; *Manser v. Dix*, 1 K. & J. 451: 1 Jur. N. S. 406; *Lafone v. Falkland Islands Company* (No. 1), 4 K. & J. 34; *Bluck v. Galsworthy*, 2 Giff. 453, 456: 7 Jur. N. S. 91; *Ford v. De Pontes*, 5 Jur. N. S. 993: 7 W. R. 290, M. R.; *Charlton v. Williams*, 4 Giff. 372: 9 Jur. N. S. 534; *Mornington v. Mornington*, 2 J. & H. 697; *Peaser v. Williams*, 11 Jur. N. S. 902, V. C. S.; and cases collected, *Saton*, 1059; but see *Goodall v. Little*, 1 Sim. N. S. 155: 15 Jur. 309. The privilege exists in the case of a foreign legal adviser: *Bunbury v. Bunbury*, 2 Beav. 173; *Lawrence v. Campbell*, 4 Drew. 485: 5 Jur. N. S. 1071; and also where the professional adviser had, at the time of the communication, without the client's knowledge ceased to practice: *Calley v. Richards*, 19 Beav. 401.

5 *Gaskell v. Chambers* (No. 2), 26 Beav. 303: and see *Blenkinsop v. Blenkinsop*, 2 Phil. 667; *Rev.* 11 Beav. 134: 11 Jur. 721.

6 *Attorney-General v. Berkeley*, 2 J. & W. 201, 204; *Reynell v. Sprye*, 10 Beav. 51, 55; *Ward v. Ward*, 3 McN. & G. 365: 15 Jur. 759.

defence;¹ but a mere claimant is not entitled to the production of cases or opinions taken by the trustee for the purpose of enabling him to choose between different classes of claimants, under the trust instrument.² The privilege also extends to communications between the solicitor of the party and a third person, which refer to the subject-matter in dispute, and are written in anticipation of or pending the suit;³ and also to communications between the party or his solicitor and an unprofessional agent, if the circumstances of the case have rendered the employment of the agent necessary,⁴ and to all notes and observations of counsel on their briefs; but the briefs themselves, so far as they consist of matter which is *publici juris*, and counsel's endorsement or note of any order made by the Court, are not privileged.⁵

In order to avail himself of this objection, the party objecting must distinctly swear that he believes the communications to be privileged; and it is not sufficient for him to say that he is advised, and insists that they are so.⁶

Where a solicitor is charged with fraud, the privilege does not attach to documents in his possession relating to the subject-matter of the suit;⁷ and where a solicitor was charged with having been a party to a fraud committed by a deceased client, of whom there was no personal representative, he was ordered to produce all documents relating to the transaction; whether his own or those of his deceased client.⁸

A party may also object to the production of documents on the ground that their production would tend to involve him in a criminal charge;⁹ or to subject him to a penalty or forfeiture.¹⁰ Objections

1 *Wynne v. Humberston*, 27 Beav. 421; 5 Jur. N. S. 5; and see *Woods v. Woods*, 4 Hare, 83, 86; 9 Jur. 615; *Brown v. Oakshott*, 12 Beav. 252; *Devaynes v. Robinson*, 20 Beav. 42; *Talbot v. Marshfield*, 13 W. R. 885, V. C. K.; and also *Tugwell v. Hooper*, 10 Beav. 348.

2 *Wynne v. Humberston*, 27 Beav. 421.

3 *Simpson v. Brown*, 33 Beav. 482.

4 *Reid v. Langlois*, 1 McN. & G. 627, 638; 14 Jur. 467; *Steele v. Stewart*, 1 Phil. 471; *Carpmael v. Powis*, *ib.* 687; *Lafone v. Falkland Islands Company* (No. 1), 4 K. & J. 34; *Hooper v. Gunn*, 2 J. & H. 602; *Walsham v. Stainton*, 2 H. & M. 1; and see *Churton v. Freven*, 2 Dr. & Sm. 390.

5 *Walsham v. Stainton*, 2 H. & M. 1; *Nicholl v. Jones*, 13 W. R. 451, V. C. W.

6 *Balguy v. Broadhurst*, 1 Sim. N. S. 111; and see *ante*.

7 See *ante*. 8 *Feaver v. Williams*, 11 Jur. N. S. 902, V. C. S.

9 *Rice v. Gordon*, 13 Sim. 590; 7 Jur. 1076; *Waters v. Earl of Shaftesbury*, 12 Jur. N. S. 3; 14 W. R. 259, V. C. S.

10 A party cannot decline to make the usual affidavit as to documents on the ground that he is liable to penalties under the 13 Eliz. ch. 5 (Act as to fraudulent conveyances): *Bunn v. Bunn*, 12 W. R. 561 L.J.J.

of this kind are governed by the same rules, whether made to the production of documents upon a demurrer to discovery, or upon exceptions to an answer, and have already been considered.¹

In an ordinary suit for redemption, where there is no dispute concerning the fact of the mortgage, the Court will not, before decree, allow the plaintiff to inspect the mortgage deed. Where, however, the defendant does not submit to be redeemed, but denies that he is a mortgagee, he cannot assert the rights of a mortgagee, and claim, upon that ground, to withhold production of the deeds until payment has been made.² Where the only question in dispute was the amount the plaintiff had to pay, production of the endorsement upon the mortgage deed, which was stated to afford evidence on that point, was directed.³ A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute.⁴

A mortgagee cannot refuse production of the mortgage deeds of the persons interested in the mortgage money on the ground that the mortgagor may possibly be injured by the production.⁵ Where a person was mortgagee and also executor and trustee of the testator in the cause: although he was allowed to withhold production of his mortgage deed, and other deeds relating to the mortgaged estate he was compelled to produce certain accounts and writings relating thereto, which it was stated might affect the testator's general estate.⁶

Where any documents are ordered to be left or deposited, whether for safe custody, or for the purpose of an inquiry in Chambers, the same are to be left or deposited in the Record and Writ Clerks' Office or with a Deputy Registrar; and it would appear that it is not the course of the Court to order production at

¹ *Ante*.

² See *Wigram on Disc.* 287; and see *Neate v. Latimer*, 2 Y. & C. Ex. 257; 8 C. *Latimer v. Neate*, 11 Bligh, N. S. 149; 4 Cl. & F. 570; and see 2 Phil. 490; *Gill v. Eytton*, 7 Beav. 155; *Greenwood v. Rutwell*, *ib.* 291; *Cripp v. Platel*, 8 Beav. 62; *Browne v. Lockhart*, 10 Sim. 421; 4 Jur. 157; *Johnston v. Tucker*, 11 Jur. 382, V. C. R.; *Cannock v. Jauwoey*, 1 Drew. 467; *Jones v. Jones*, Kay, App. 6; *Lewis v. Davies*, 17 Jur. 253, V. C. R.; *Howard v. Robinson*, 4 Drew. 522; 5 Jur. N. S. 136; *Bridgewater v. De Winton*, 9 Jur. N. S. 1370; 12 W. R. 40, V. C. R.; *Freeman v. Butler*, 33 Beav. 289; *Smith v. Barnes*, 1 Law Rep. Eq. 65; 11 Jur. N. S. 924, M. R.; *Patch v. Ward*, 12 Jur. N. S. 2; 14 W. R. 166, V. C. S. For cases of impeached documents, see *ante*.

³ *Phillips v. Evans*, 2 Y. & C. C. 647.

⁴ *Bell v. Chamberlin*, 3 Cham. Rep. 429.

⁵ *Gough v. Offley*, 5 De G. & S. 653.

⁶ *Freeman v. Butler*, 33 Beav. 289; and see *Gibson v. Hewett*, 9 Beav. 298.

any other place, except upon the consent of the party in whose possession they are.¹ Upon the application, however, of such party, the Court will frequently order production at some other place, for the sake of convenience.² And where the party states that the books and papers are in constant use in his business, and necessary for that purpose, and that the deposit of them in Court will be productive of injury to him, the Court will, in the first instance, give credit to that statement, and order that they be produced at the place of business at which they are in use; and if the applicant does not obtain a satisfactory inspection of them there, it is open to him to apply for a further order.³ Acting upon this principle, the Court will order the production at the place of business of the party's solicitor;⁴ but as such an order is made for the party's convenience, the Court will not allow his solicitors to make any charge against the applicant for the inspection;⁵ and where, at the request of the applicant, they make any copies he may require and is entitled to take, they are only entitled to the usual law stationer's charges.⁶

Where an order for production at a solicitor's office has once been made, production at the same place will, in the absence of special circumstances, be directed by all subsequent orders.⁷

The order directs production to the party, his solicitor, and agents;⁸ but it seems that these words mean, his solicitors in the cause, and some person professionally connected with them, or his general agents; and, accordingly, do not authorize production to an accountant or agent specially employed for the particular purpose of inspecting the documents;⁹ but if required by the circumstances of the case, an order directing the production to such a special agent will be made.¹⁰

1 *Mound v. Allies*, 4 M. & C. 503, 507 : 3 Jur. 309.

2 The rule adopted by the Master of the Rolls is always to order production out of Court, unless some special grounds are shown by the party seeking production for ordering the documents to be deposited in Court.

3 *Grane v. Cooper*, 4 M. & C. 263; *Gardner v. Dangerfield*, 5 Beav. 389; *Prentice v. Phillips*, 2 Hare, 152; *Mayor of Berwick v. Murray*, 1 McN. & G. 530; 13 Jur. 1005; *Carew v. Davis*, 21 Beav. 213; *Talbot v. Marshfield*, 1 Law Rep. Eq. 6; 11 Jur. N. S. 901, V. C. K.; *Mertens v. Haigh*, Johns. 735; *Hooper v. Gumm*, 2 J. & H. 602.

4 For forms of orders, see *Seton*, 1040-1042.

5 *Woodroffe v. Daniel*, 10 Sim. 126; *Flockton v. Peake*, 12 W. R. 1023, V. C. W.

6 *Kennedy v. George*, 6 W. R. 218, V. C. S.; and see *Prentice v. Phillips*, 2 Hare, 152.

7 *Groves v. Groves*, 2 W. R. 86, V. C. W.; and see *Mertens v. Haigh*, Johns. 735.

8 See forms of orders, *Seton*, 1040, *et seq.*

9 *Bartley v. Bartley*, 1 Drew. 233; 16 Jur. 1062; *Summerfield v. Pritchard*, 17 Beav. 9; 10 Hare, App. 63; 17 Jur. 361; *Coleman v. West Hartlepool Railway Company*, 5 L. T. N. S. 268, V. C. W.; *Draper v. Manchester & Sheffield Railway Company*, 3 De G. F. & J. 23; 7 Jur. N. S. 86.

10 *Bonnadot v. Taylor*, 1 J. & H. 388; 7 Jur. N. S. 328.

Where an undertaking to produce the documents to a party has been given, the production must be made to his solicitors and agents, unless that is guarded against, and so expressed.¹

The documents are usually directed by the order to be produced at any examination of witnesses, and at the hearing of the cause.²

The effect of the order for the production of documents is only to give the applicant the power of inspecting and taking copies of them. It does not make the documents evidence in the cause, unless the mere circumstance of their coming out of the custody of the party would, in itself, render them admissible evidence. Where the documents have been deposited with the Record and Writ Clerk, the order for production, in itself, establishes that the documents came out of the party's custody: so that it is not necessary to enter into any evidence for the purpose of proving that fact.³

A party, who has obtained inspection and production of documents, under an order of the Court, has no right to make public the information so obtained; and will, if necessary, be restrained by injunction from so doing;⁴ nor will he be permitted to make use of the information for purposes collateral to the suit.⁵

If the documents are ordered to be deposited at the Record and Writ Clerk's Office, the original order should, if possible, be produced; and, in every case, an affidavit and a schedule of the documents must be left at the time the deposit is made.⁶

Inspection of documents so deposited will be refused, as well to the party depositing them, as to a plaintiff or defendant, unless he is either suing or defending in person, or is introduced by his

1 *Williams v. Prince of Wales Life Company*, 23 Beav. 338; 3 Jur. N. S. 55.

2 See *Wheat v. Graham*, 7 Sim. 61; and forms of orders, *Seton*, 1049, *et seq.*

3 *Taylor v. Salmon*, 3 M. & C. 422.

4 *Williams v. Prince of Wales Life Company*, *ubi sup.*

5 *Richardson v. Hastings*, 7 Beav. 354; and see *Tagg v. South Devon Railway Company*, 12 Beav. 151; *Reynolds v. Godlee*, 4 K. & J. 88.

6 *Braithwaite's Pr* 506. The documents must be made up in a parcel, or enclosed in a wooden or tin box; and the short title of the cause, and the name and address of the solicitor or party making the deposit, must be written on the parcel or box. Strong brown or cartridge paper should be used for the parcel. Where the parcel would exceed about twelve inches in length and width, and ten in depth, or fifteen in length, twelve in width, and six in depth, a box will in general be required. The box must have a lock and key; and the key should have a parchment label, with the short title of the cause, and the name of the solicitor or party written thereon: *ib.*

solicitor.¹ Where liberty to inspect is given in the ordinary form, the party entitled to inspect may do so in the absence of the party depositing the documents : where, therefore, it is desired that this practice should be modified, the order should be qualified accordingly.² A defendant is not allowed to inspect documents deposited by a co-defendant, unless expressly authorised so to do by order, or the inspection is sanctioned by such co-defendant, or by the plaintiff.³

Copies of, or extracts from, documents inspected may be taken by the person making the inspection, without payment of any fee ; and any such copies or extracts may be obtained by him from the Record and Writ Clerk's Office.

If documents deposited in Court are afterwards required to be produced at any examination of witnesses in the cause, or in Court, or at any of the offices of the Court, the Record and Writ Clerk will attend with them on request, on a memorandum bespeaking the attendance being left with him, and on payment of the proper fee;⁴ but if the production is required at any place out of the Court of Chancery, or its offices, an order must be procured for the Record and Writ Clerk to attend with the required documents : as the usual order only authorises the production at any examination of witnesses in the cause or at the hearing.⁵ This order may be obtained on motion of course, supported by an affidavit that the production of the documents is necessary for the purposes of evidence.⁶

Order 542 provides that "Where on a proceeding before an officer of the Court, pleadings or other documents, filed with another officer of the Court, are required, the officer with whom the pleadings or other documents are filed is, upon production of a certificate signed by the officer requiring the pleadings or other documents, that the same are required for some proceeding before him, to

1 *Braithwaite's Pr.* 509. No fee is payable by a party inspecting his own documents : but the following fees are payable in England on inspection by other parties :—If occupied not more than one hour, 5s. ; and if more than one hour, *per diem*, 10s. ; Regul. to Ord. Sched. 4 ; *Braithwaite's Pr.* 508. The fee is not charged, where the inspection is merely made to select a document on bespeaking a copy of it : see *ib.*

2 *Braithwaite's Pr.* 509. 3 See *ibid.*

4 *Braithwaite's Pr.* 508, 512. For the fee payable, see *ante*.

5 See forms of orders, *Suton*, 1040, Nos. 1, 3 ; 1041, No. 5.

6 *Braithwaite's Pr.* 508, 514 ; and *ante*.

transmit the pleadings or other documents mentioned in the certificate." Order 543 that "Where such documents are to be transmitted from one officer of the Court in Toronto to another, they are to be transmitted by delivering the same to the officer requiring the same, or his clerk." Order 544 that "Where such documents are to be transmitted by an officer of the Court in Toronto to one in an outer county, or from an office in an outer county to one in Toronto, they are to be sent by parcel post, or by express, and before they are sent, the party requiring their transmission is to deposit a sufficient sum to cover the expense of transmission, and of re-transmission to the office from which they are sent." And Order 545 that "As soon as the purpose for which any such documents are required is completed, the officer to whom they have been sent is to re-transmit them to the office from which they were sent."

When it is required to produce any of the original pleadings filed in this Court before any other Court, the person desiring their production must obtain an order of this Court for that purpose.¹

In the absence of any special case being made, documents deposited in Court will not be ordered to be taken out of the jurisdiction, for the purpose of being produced at an examination of witnesses.²

When the purpose for which the documents have been deposited in Court is satisfied, the person who has produced them is entitled to have them delivered out to him.³ An order is, however, necessary: which may be obtained on motion with notice; or, by consent.⁴ A copy of the order, or of so much thereof as directs the delivery out, with a receipt signed by the person to whom the delivery out is directed to be made, and witnessed, must be left, and the original order must be produced, at the Record and Writ Clerk's Office, at the time the application for the delivery out is made.⁵

¹ *Cottle v. Cummings*, 2 Grant, 580.

² *Lafone v. Falkland Islands Company* (No. 2), 4 K. & J. 39.

³ *Dunn v. Dunn*, 3 Drew. 17: 18 Jur. 1068; 7 De G. M. & G. 25: 1 Jur. N. S. 122.

⁴ *Braithwaite's Pr.* 507. For form of order, see *Seton*, 1062.

⁵ *Braithwaite's Pr.* 507. Where the person entitled attends in person, he signs a receipt prepared at the office, on the documents being delivered to him.

An order for the production of documents is enforced by attachment, or other process of contempt, in the usual manner.¹ Where the plaintiff was shown a document, inspection of which was refused until counsel's opinion had been taken whether it was privileged, and subsequently the defendant declared that he had lost it, an attachment was ordered to issue.²

On a motion to commit for non-production of certain documents after an insufficient affidavit on production has been filed, it is not absolutely necessary that the notice of motion shall specify what is demanded in addition to what is produced, though the Court considered such the better course.³ The practice as to committal for non-production has been considered in a former part of this work in the chapter on "Decrees and Orders."

1 *Ante*. As to the power of sequestrators to seize documents ordered to be deposited, see *ante*; and as to enforcing an affidavit as to documents, see *ante*.

2 *Lord Mornington v. Keane*, 4 W. R. 793, V. C. W.

3 *Fisken v. Smith*, 2 Cham. Rep. 491.

(1864)

CHAPTER XLVI.

SPECIAL CASE.

A special case is a mode of proceeding by means of which persons interested in questions cognisable in the Court of Chancery may, upon a statement of facts, obtain the opinion and direction of the Court, without any consequential relief. This form of procedure is entirely of statutory origin;¹ and was at first of great utility; but, in consequence of the changes which have been subsequently introduced into the general practice of the Court, its utility has been much diminished.

Our Statute, 28 Vic., ch. 17, sec. 1, passed in 1865, declares that "The Court of Chancery in Upper Canada shall have the same jurisdiction as the Court of Chancery in England has, in regard to leases and sales of settled estates, and in regard to enabling minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage, and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or, otherwise concur therein." The English statute, therefore, just referred to, 13 and 14, Vic., ch. 35, so far as it relates to the jurisdiction and powers of the Court as to the subjects mentioned in our statute, is virtually in force here; and the English cases decided on it will be applicable here.

The Act provides, that persons interested, or claiming to be interested, in any question cognisable in the Court, as to the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter or thing therein contained,

¹ 13 & 14 Vic. ch. 35,

or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties to or the form of any deed or instrument for carrying any such contract into effect, or as to any other matter falling within the original jurisdiction of the Court as a Court of Equity, or made subject to the jurisdiction or authority of the Court by any statute: not being one of the statutes relating to bankrupts: and including among such persons all lunatics,¹ married women, and infants, in the manner and under the restrictions in the Act contained: may concur in stating such question in the form of a special case for the opinion of the Court; and that all executors, administrators and trustees may concur in such case.²

The committee of the estate of a lunatic may, with the authority of the Lord Chancellor,³ concur in his own name, and in the name and on behalf of the lunatic.⁴ A husband may concur in his own and his wife's name, where she has no interest distinct from him; and where she has a distinct interest, she may concur in her own right, if her husband also concurs:⁵ but then it must be stated, in the special case, that she concurs in her own right:⁶ and if she is a plaintiff and her husband is a defendant, a next friend must be named.⁷ The guardian⁸ of an infant may, unless he has an interest adverse to the infant, concur in the name and on behalf of the infant.⁹

The Court may, by order to be made in the matter of any lunatic not found such by inquisition, or in the matter of any infant, upon the application of any person on the behalf of such lunatic, or upon the application of such infant, by motion or petition, appoint any person shown by affidavit to be a fit person, and to have no interest adverse to the interest of the lunatic or infant, to be the special guardian of such lunatic or infant, for the purpose of concurring in such case in the name and on behalf of the lunatic or infant, and the person so appointed may lawfully so concur: the

1 This term, as used in the Act, includes idiots, and persons of unsound mind, and whether found such by inquisition or not: 13 & 14 Vic., sec. 34. 2 *Ibid.*, sec. 1.

3 Or Lords Justices: see 14 & 15 Vic. ch. 83: 15 & 16 Vic. ch. 87, sec. 15.

4 13 & 14 Vic. ch. 35, sec. 2.

5 *Ibid.*, sec. 3.

6 *Ibid.*, sec. 9.

7 *Ibid.*, sec. 7.

8 This term, as used in the Act, includes the father or testamentary guardian, or guardian appointed by the Court of Chancery (not being a special guardian appointed under the Act): *Ibid.*, sec. 34; *Ellis v. Guitton*, 18 L. T. 289, V. C. P.

9 13 & 14 Vic. ch. 35, sec. 4.

Court may, however, require notice of such application to be given to such person, if any, as the Court shall think fit;¹ and in the case of infants, unless notice is given of such application to the infant's guardian, the order may be discharged on motion or petition, and a new order made.² It must also be stated in the special case how the guardian, or special guardian, of an infant or lunatic was constituted.³

The application for the appointment of a special guardian must be made on motion in Court: and not by petition;⁴ nor in chambers;⁵ and must be supported by an affidavit, entitled in the matter of the infant or lunatic and of the Act,⁶ showing the fitness of the proposed guardian, and that he has no interest adverse to the infant or lunatic.⁷ A next friend is not required for an infant.⁸

As a general rule, all parties interested in the questions submitted to the Court must be parties to the special case: the practice in this respect being the same as in the case of suits;⁹ and it seems that the exceptions to, or modifications of, this general rule, introduced by the Chancery Amendment Act,¹⁰ apply to special cases.¹¹ Thus, where a class was sufficiently represented, a special case was entertained¹² in the absence of a member of it who was out of the jurisdiction;¹³ and under similar circumstances, where some of the members of the class had died intestate, the executors of their father were appointed¹⁴ to represent their estates for the purposes of the proceedings.¹⁵ It has been held that trustees should be parties to the case.¹⁶

It seems that the form of suit which, as we have seen, is commonly adopted where the plaintiff is one of a large class in the same inter-

1 13 & 14 Vic. ch. 35, sec. 5.

2 *Ibid.*, sec. 6.

3 *Ibid.*, sec. 2.

4 *Re Goodfellow*, 1 Eq. Rep. 191, V. C. W.

5 *Thornhill v. Copleston*, 10 Hare, App. 67. For form of order on motion, see *Seton*, 33.

6 *Star v. Newbery*, 20 Beav. 14; but not in the special case: it being not yet filed, *ib.*; and see *Madison v. Skein*, 6 L. T. N. S. 20, V. C. W., where the title was allowed to be amended.

7 *Ex parte Craig*, 15 Jur. 762, V. C. K. B.; *Ellis v. Guitton*, 18 L. T. 269, V. C. P.

8 *Ex parte Craig*, *ubi sup.*

9 See 13 & 14 Vic. ch. 35, sec. 32.

10 15 & 16 Vic. ch. 86, sec. 42; sec. 51; and sec. 52.

11 *Swallow v. Binns*, 9 Hare, App. 47; 17 Jur. 295; *Wilson v. Whateley*, 1 J. & H. 331; 7 Jur. N. S. 908; *Re Brown*, 29 Beav. 401; 7 Jur. N. S. 650; see, however, *Entwistle v. Cannon*, 4 W. R. 429, V. C. K.

12 Under 15 & 16 Vic. ch. 86, sec. 51.

13 *Re Brown*, *ubi sup.*; but see *Entwistle v. Cannon*, *ubi sup.*

14 Under 15 & 16 Vic. ch. 86, sec. 41.

15 *Swallow v. Binns*, *ubi sup.*

16 *Vorley v. Richardson*, 8 De G. M. & G. 126; 2 Jur. N. S. 302, overruling *Darby v. Darby*, 18 Beav. 412.

est as himself, namely, suing on behalf of himself and the others of the class,¹ cannot be adopted in special cases: such others not being before the Court, and, therefore, not bound by the proceedings.²

A special case must be entitled as a cause between some or one of the parties interested, or claiming to be interested, as plaintiffs or plaintiff, and the others or other of them as defendants or defendant; and in the title to such case, lunatics and infants must be described as such, and their committees, guardians, or special guardians named; and where a married woman is named as a plaintiff and her husband as a defendant, a next friend of such married woman must be named in the title.³ The case should state concisely such facts and documents as are necessary to enable the Court to decide the question raised thereby.⁴

The draft case is usually prepared by the counsel for the plaintiff, and, is submitted to the solicitor of the defendants for the approval of their counsel. When finally approved, the draft must be signed by counsel for all parties.⁵ A copy of the case (including counsel's signature) must then be made on paper of the same description and size as that on which bills are printed:⁶ and underwritten with the name and place of business of the plaintiff's solicitor, and of his agent, if any, or with the name and place of residence of the plaintiff where he acts in person, and, in either case, with the address for service, if any.⁷ The engrossment is filed at the Record and Writ Clerk's Office, in the same manner as a bill is filed;⁸ and notice of filing should be given, on the same day, to the solicitors of the defendants. The plaintiff must take an office-copy of the special case; but the defendants need not do so.⁹

The defendants must enter their appearances to the special case, in the same manner as defendants appear to bills;¹⁰ but no proceeding can be taken to enforce such appearance; nor can an

¹ *Ante*.

² *Lee v. Head*, 1 K. & J. 620: 1 Jur. N. S. 722.

³ 13 & 14 Vic. ch. 35, sec. 7.

⁴ *Ibid.*, sec. 8; see *Buikley v. Hope*, 8 De G. M. & G. 38.

⁵ 13 & 14 Vic. ch. 35, sec. 10. One counsel may, it seems, sign for all parties: *Ex parte Craig*, 16 Jur. 762, V. C. K. B.; *Stapleton v. Stapleton*, 17 L. T. 15, V. C. Ld. C.

⁶ Ord. 16 March, 1860, r. 16.

⁷ 13 & 14 Vic. ch. 35, sec. 32.

⁸ 13 & 14 Vic. ch. 35, sec. 10.

⁹ *Ibid.*

¹⁰ *Ibid.*

appearance be entered for a defendant at the instance of the plaintiff.¹

The filing of a special case, and the entering of appearances thereto by the persons named as defendants is to be taken to be a *lis pendens*, and may be registered, in like manner as any other *lis pendens* in a Court of Equity may be registered: but, until so registered, is not to bind a purchaser or mortgagee without express notice.²

Before the special case is set down for hearing, it may be amended at any time, under an order to amend: which must be obtained on motion of course by consent of all parties;³ but after it is set down, special leave of the Court is necessary.⁴ Under an order of course the case may be amended in any respect, as the parties may be advised: as all parties, by their counsel, must approve the amendments. The rules of practice, however will not allow the name of the plaintiff's solicitor to be altered under a common order to amend; nor, it seems, the name of a defendant to be struck out, unless the order expressly so directs, and provision is made for his costs.⁵

The draft of the case as amended must be signed by counsel for all parties:⁶ and if the amendments do not extend in any one place to 180 words, the Record and Writ Clerk will insert the amendments in the record, on the draft amended case being left with him, together with a *præcipe* for the amendment;⁷ but if the amendments exceed this limit, a new engrossment must be filed.⁸ The order to amend must be produced at the time the draft is left for amendment, or the new engrossment filed; if the record is merely altered, the plaintiff's office-copy will be amended, without charge, on being left at the Record and Writ Clerk's Office; but where a new engrossment is filed, he must take an office-copy thereof.⁹

Where a special case is amended after the appearance of a defendant, it seems an appearance to the amended case must be entered by him.¹⁰

1 *Brathwaite's* Pr. 330.

3 *Brathwaite's* Pr. 315.

5 *Ibid.* 315.

9 *Ibid.* 315.

6 *Ant.*

10 *Thistlethwaite v. Garnier*, 5 De G. & S. 73: 16 Jur. 57; *Brathwaite's* Pr. 330.

2 13 & 14 Vic. ch. 25, sec. 17.

4 *Brathwaite's* Pr. 315: and see post.

7 *Brathwaite's* Pr. 315.

8 *Ibid.*

Where a special case has abated, it may be revived in the same manner as a suit commenced by bill.¹

After a special case is filed, and the defendants have appeared, all the parties are subject to the jurisdiction of the Court in the same manner as if the plaintiff had filed a bill against the parties named as defendants, and the defendants had appeared to such bill; and upon the special case being filed and appearance entered, all parties thereto, other than married women, infants and lunatics, are, for the purposes of the special case, bound by the statements therein: and married women, infants and lunatics, parties thereto, are, for the purposes of the special case, bound by the statements therein, when, and not before, leave has been given by the Court to set it down for hearing.²

When all the defendants have appeared, the special case may be set down for hearing:³ unless there is a married woman, infant or lunatic, a party: for then application must be made to the Court, by motion, for leave to set the case down; and of which motion, notice must be given to every party to the case in whom, as executor, administrator or trustee, any property in question therein is or is alleged to be vested in trust for the married woman, infant or lunatic; and also if the application is not made by or on behalf of the married woman, infant or lunatic, to the married woman and her husband, or to the infant, or the lunatic and his committee, if any, as the case may be; and upon the hearing of the motion the Court may give leave to set down the case, if it is of opinion that it is proper that the question raised should be determined upon a special case, and is satisfied by affidavit or other sufficient evidence that the statements contained therein, so far as the same affect the interest of the married woman, infant or lunatic, are true,⁴ but otherwise may refuse such application; but if the Court, upon hearing the application, is of opinion that it is proper that the question raised should be determined upon the special case, but is not satisfied that the statements contained therein, so far as they affect the interest of the married woman,

¹ *Wilson v. Whateley*, 1 J. & H. 331: 7 Jur. N. S. 908; and see *ante*.

² 13 & 14 Vic. ch. 35, sec. 11.

³ *Ibid.*, sec. 12.

⁴ The Record and Writ Clerk's certificate that the special case has been duly filed, and that appearances have been entered for all the defendants, is also required: *Brailmont's Fr.* 436, 437.

infant or lunatic, are true, it may direct inquiries in chambers, and upon further application being made, by motion, upon the inquiries being answered, the Court may give or refuse leave to set down the special case.¹ The application for leave to set down a special case cannot, it seems, be made in Chambers.²

The special case is set down by the Registrar. If all parties are not *sui juris*, he will require for this purpose the order giving leave to set the case down; but if all parties are *sui juris*, he will set the case down, upon production of the Record and Writ Clerk's certificate that the case is fit to be set down for hearing, and upon such certificate being endorsed by the solicitor with a memorandum that all parties are *sui juris*.³

The special case is set down to be heard before the Court in the usual way;⁴ but it may, by consent of all parties, be afterwards set down to be heard before the Court of Appeal in the first instance by permission of that Court.⁵

A copy of the special case, and of any material documents not sufficiently set out therein, should be left, before the hearing, with the Judges by whom the case is to be heard.⁶

Where, after a special case had been set down, an infant tenant in tail was born, the Court, on *ex parte* motion, discharged the order which had been made for setting it down, and gave leave to amend by making the infant a party; and expressed an opinion that fresh appearances must be entered for all the defendants, and a new order made for setting it down: when the amended case might be ordered to take the place of the original case in the paper.⁷ Where also one of the parties to the special case died after it had been set down, leave was given to amend the case, by making his representatives parties.⁸

1 13 & 14 Vic. ch. 35, sec. 13. For form of order to set down the case, see *Seton*, 33. The motion must be mentioned to the Court: *Sidebotham v. Watson*, 1 W. R. 229, V. C. W.

2 *Sidebotham v. Watson*, *ubi sup.*

3 Reg. Regul. 15 March, 1860, r. 8; *Braithwaite's Pr.* 436, 437.

4 *Ante*.
5 *Palmer v. Simmonds*, 1 W. R. 122, V. C. K.; *Tassell v. Smith*, 2 De G. & J. 713; 4 Jur. N. S. 1090; *Mortimore v. Mortimore*, 4 De G. & J. 472; *Hume v. Richardson*, 8 Jur. N. S. 636; 10 W. R. 523, L. J.

6 Counsel's brief will ordinarily consist of the like papers, accompanied by such observations as may be deemed necessary. An infant should appear by separate counsel, notwithstanding the same solicitor is acting for all parties: *Seton*, 33, citing *Wright v. Woodham*, 17 L. T. 293, V. C. T.

7 *Thistlethwaite v. Garnier*, 5 De G. & S. 73; 16 Jur. 57.

8 *Ainsworth v. Almon*, 14 Beav. 597.

It seems, however, that the correct practice in such a case, is to revive the case.¹

Leave has been given, at the hearing, to amend the special case, by altering the form of the question, and the opinion of the Court given as on the amended case, without postponement.²

Upon the hearing of the special case, the Court may refer to the whole contents of the documents therein stated; and may draw from the facts and documents stated, any inference which the Court might have drawn from them if proved in a cause;³ and it may determine the questions raised or any of them, and by decree declare its opinion thereon, and, so far as the case admits, upon the rights involved, without proceeding to administer any relief consequent upon such declaration; and every such declaration has the same force and effect as such declaration would have had, and is binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill; but, if, upon the hearing of the special case, the Court is of opinion that the questions raised or any of them cannot properly be decided upon the special case, the Court may refuse to decide the same.⁴

Where the facts and questions stated on the special case did not enable the Court to determine the rights of the parties, it refused to make any order;⁵ and it has been observed by Lord St. Leonards, L. C., that, the Court is not bound to answer every question the parties may think fit to put.⁶ Where, however, a material fact was accidentally omitted in the statements of the case, but it appeared to have been recognised by all parties, the circumstances, showing that it had been so recognised, were recited in the order.⁷ Where, in the case, a fact was stated "to be believed," the Court directed the case to stand over to be amended by stating the facts upon

¹ Under 15 & 16 Vic. ch. 86, sec. 52; *Wilson v. Whateley*, 1 J. & H. 331: 7 Jur. N. S. 908.

² *Bell v. Cade*, 2 J. & H. 122.

³ 13 & 14 Vic. ch. 35, sec. 8.

⁴ 13 & 14 Vic. ch. 35, sec. 14. This section contains a proviso, enabling the Court to send a case for the opinion of a Court of Law; but it is presumed that this power is abolished by the 15 & 16 Vic. ch. 86, sec. 61. For forms of decrees, see *Seton*, 30, 34.

⁵ *Bulkeley v. Hope*, 8 De G. M. & G. 36.

⁶ *Viscount Barrington v. Liddell*, 2 De G. M. & G. 480, 506; and see *Bailey v. Collett*, 23 L. J. Ch. 230, M. R. For form of decree, where the Court declines to answer one of the questions, see *Seton*, 34.

⁷ *Lane v. Debenham*, 17 Jur. 1005, V. C. W.; where all parties to the case appear, however, to have been *sui juris*, and consented.

which the belief was founded : Sir G. J. Turner, V. C., observing, that the Court could not act on inferences drawn by the parties : nor could it direct an inquiry on a special case ; but that, when the evidence was doubtful, the special case must state all the facts upon the subject which could be ascertained, and state, and verify (if necessary) by affidavit, that no further evidence could be given ; and upon that allegation and proof, it must be left to the Court to judge of the result of the statement.¹

The Court has no jurisdiction to declare future rights, on special cases ;² and it has accordingly repeatedly refused to do so.³

The decree or order on a special case is drawn up and passed by the Registrar, in the usual way ;⁴ and may be enrolled in like manner as decrees in suits by bill.⁵

All decrees and orders under the Act are subject to rehearing, appeal, and review, and may be discharged and varied, in like manner as decrees and orders of the Court made in suits instituted by bill ;⁶ and where any of the parties are desirous to have a special case reheard, or to appeal from the decision thereon, the Court may, upon application for that purpose, either at the time of the decree being made or at any time afterwards, and upon such conditions, if any, as the Court shall think fit, order that the declaration contained in such decree shall not be acted upon for such time as the Court shall think just.⁷

The Act provides, that every executor, administrator, trustee or other person making any payment, or doing any act, in conformity with the declaration contained in any decree made upon a special case, shall in all respects be as fully and effectually protected and indemnified by such declaration, as if such payment had been made or act done under or in pursuance of the express order of the Court made in a suit between the same parties instituted by

1 *Domville v. Lamb*, 9 Hare, App. 55.

2 See observations of L. J. Turner, in *Lady Langdale v. Briggs*, 8 De G. M. & G. 426, 427, 428 : 2 Jur. N. S. 982, 993 ; and see *Earl of Tyrone v. Marquis of Waterford*, 6 Jur. N. S. 567, L. C. & L.J.J.

3 *Greenwood v. Sutherland* 10 Hare, App. 12 ; *Garlick v. Lawson*, *ib.* 14 ; *Burt v. Sturt*, 1 W. R. 145, V. C. W. ; *Gosling v. Gosling*, Johns. 265 : 5 Jur. N. S. 910 ; *Bell v. Cade*, 2 J. & H. 122. In the last case, however, the difficulty was got over by declaring that "the plaintiff was entitled to file a bill to secure the fund."

4 *Ante*. For forms of decrees, see *Seton*, 30, 34.

5 *Braithwaite's Pr.* 106, 402.

6 13 & 14 Vic. ch. 35, sec. 33 ; *ante*.

7 13 & 14 Vic. ch. 35, sec. 16.

bill : save only as to any rights or claims of any person in respect of matters not determined by such declaration.¹

Any documents referred to in a special case, and any copies thereof or extracts therefrom, identified by the signature of the solicitors for all parties, or of the London agents of such solicitors, may be produced and read at the hearing of such case, without further proof ; and the Court may, at any time after the filing of the special case, and the entering of appearances thereto by the persons named as defendants, order any document, which may be admitted thereby to be in the possession of any party to such case, to be deposited and produced in such manner, and for such purposes, as the Court shall think fit.² The application for this purpose may be made by motion.³

With regard to the costs of a special case, there appears to have been some difference of opinion among the Judges of the Court as to the jurisdiction. The Act provides that they shall be in the discretion of the Court ;⁴ and it was held by Sir J. L. Knight Bruce, V. C., that the Court has power to direct payment of the costs of a special case ;⁵ but it has been held by Sir W. P. Wood, V.C., that the Court has no jurisdiction to order payment, unless there is a fund in Court ;⁶ and that, therefore, unless the parties have agreed how they shall be paid, there should be a question in the case out of what fund they ought to come.⁷ Since this decision, it is usual to insert such a question, when the opinion of the Court on the point is desired ;⁸ but it would seem that the Court has, in several subsequent cases, when there is no fund in Court, and no question asked, decided how the costs shall be paid.⁹ It will be seen, also, by reference to the cases cited, that, in determining the question by whom or out of what fund the costs shall be paid, the Court is guided by the same rules as in ordinary suits.¹⁰

¹ 13 & 14 Vic. ch. 35, sec. 15.

² *Ibid.*, sec. 18.

³ As to the deposit and production of documents, see *ante*.

⁴ 13 & 14 Vic. ch. 35, sec. 32.

⁵ *Jackson v. Craig*, 15 Jur. 811, V. C. K. B. ; and see *Smith v. Stewart*, 20 L. J. Ch. 205 V. C. K. B. ; *Burt v. Sturt*, 1 W. R. 145, V. C. W. ; *Evans v. Evans*, 17 Jur. 339, 342, V. C. K.

⁶ *Blinston v. Warburton*, 2 K. & J. 400 : 2 Jur. N. S. 858.

⁷ *Ibid.*

⁸ *Sabin v. Heape*, 27 Beav. 553, 558 ; *Lloyd v. Cocker*, *ib.* 645, 647 ; *Marshall v. Grine*, 28 Beav. 375, 376 ; *Hume v. Richardson*, 8 Jur. N. S. 86 : 10 W. R. 523, L.J.J. ; *Gilbertson v. Gilbertson*, 13 W. R. 765, M. R. ; *Blackmore v. Snee*, 1 De G. & J. 455, 458 ; *Cooper v. Cooper*, 9 W. R. 354, M. R.

⁹ *Utcliffe v. Peters*, 4 K. & J. 437 : 4 Jur. N. S. 1271 ; *Hindle v. Taylor*, 5 De G. M. & G. 577, 584 : 1 Jur. N. S. 1029, 1032 ; *Mortimore v. Mortimore*, 4 De G. & J. 472, 476 ; *Cookson v. Bingham*, 17 Beav. 262 ; *Gibbs v. Laurence*, 7 Jur. N. S. 137 : 9 W. R. 93, V. C. W. ; *Cunningham v. Buller*, 3 Giff. 37, 42 : 7 Jur. N. S. 461.

¹⁰ See, generally, as to the costs of a special case, *Morgan & Davey*, 222, 224 ; and for precedents of plaintiffs' and defendants' costs, on a special case, see *ib.* 450-454.

The Act empowers the Lord Chancellor, with the advice and consent of the Master of the Rolls, and one or more of the Vice-Chancellors, to make general rules and orders for better enabling the opinion of the Court to be obtained on special cases, and generally for regulating the procedure relating thereto;¹ and provides that, in the meantime, and in so far as such rules and orders may not be applicable, the proceedings under the Act are to be governed and regulated by the provisions of the Act, so far as the same extend; and are, in so far as the same do not extend as well with respect to the persons who ought to be made parties to special cases as in every other respect, to be governed and regulated by the rules, orders, and practice of the Court in suits instituted by bill, so far as the same can be applied thereto; and that, subject to such general rules and orders, the costs of all proceedings under the Act are to be in the discretion of the Court.²

No general rules and orders as to special cases under the Act have been made.

¹ 13 & 14 Vic. ch. 35, sec. 30. Section 31 provides for the rules and orders being laid before Parliament.

² 13 & 14 Vic. ch. 35, sec. 32.

(1875)

CHAPTER XLVII.

INFANT CUSTODY ACT.

Section 8 of the Consolidated Statutes of Upper Canada, ch. 74, is taken from the Imperial Statute, 2 & 3 Vic., ch. 54, which, with the English decisions upon it, are here reproduced. The cases under our Statute are added.

By the 2 & 3 Vic. ch. 54, the Court is enabled, upon the petition of the mother of any infant which is in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after his death, to make such order for the access of the petitioner to such infant, at such times and subject to such regulations as the Court shall deem convenient and just; and if such infant shall be within the age of seven years, the Court may order such infant to be delivered into the hands of the petitioner until such age, subject to such regulations as the Court shall deem convenient and just.¹ Applications under this Act may be made either to the Master of the Rolls, or to any of the Vice-Chancellors.²

Upon the hearing of the petition, affidavits on either side are admissible;³ and orders made under the Act may be enforced by the usual process of contempt. No mother against whom adultery has been established by the sentence of the Divorce Court is entitled to the benefit of the Act.

The petition may be presented without a next friend;⁴ and, by leave of the Court, in *forma pauperis*.⁵ If rendered necessary by

1 2 & 3 Vic. ch. 54, sec. 1. As to this act, see *Chambers on Infants*, 98, 100; *Macpherson on Infants*, 164; *Saton*, 718; and see *Swift v. Swift*, 11 Jur. N. S. 148: 18 W. R. 578, M. R.: 11 Jur. N. S. 458: 18 W. R. 781, L.J.J.; *Austin v. Austin*, 11 Jur. N. S. 101: 18 W. R. 882, M. R.: 11 Jur. N. S. 686: 18 W. R. 761, L. C.; *Re Newbery*, 1 Law Rep. 481: 12 Jur. N. S. 20, V. C. S.: 1 Law Rep. Ch. App. 268: 12 Jur. N. S. 164, L.J.J. For forms of orders, see *Saton*, 713, 714.

2 *Re Taylor*, 10 Sim. 281.

3 2 & 3 Vic. ch. 54, sec. 2.

4 *Re Groom*, 7 Hare, 88.

5 *Re parte Hakevill*, 3 De G. M. & G. 116: 17 Jur. 334.

the circumstances of the case, it seems that an order under the Act may be made *ex parte*.¹ The mother is not entitled to an order as a matter of course, but the Court will exercise its discretion upon all the circumstances of the case.²

The object of the Act is to protect mothers from the tyranny of husbands who ill use them ; and it gives the Court the power of interfering, when the Court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother.³ The Act does not, as a condition for the interference of the Court, require that the wife should have obtained or be entitled to obtain a decree for a judicial separation ;⁴ and it gives the Court an absolute discretion as against the father or testamentary guardian ;⁵ but the Court will not interfere where the mother has deserted her husband without reasonable cause ;⁶ or where her conduct, although she has not been guilty of any moral delinquency, has not been such as to entitle her to its favourable consideration.⁷ And if the conduct of the father has been free from impropriety or bad motive, the Court has no right to have any opinion as to whether the father is judicious or not in the particular training he may direct the child to undergo.⁸

It has been held, that the Act does not enable the mother to resist an application of her husband for the custody of his children, to which, by law, he is entitled : even though upon her application the Court may be bound to order them to be delivered back to her ;⁹ or to apply where the children are not in the custody of the father.¹⁰ Where, however, the children were living with the mother, the Court, on a petition intituled in the Act, made an order continuing the custody of them to her ; but it would seem that the order was made under the general jurisdiction of the Court.¹¹

By the 3 & 4 Vic. ch. 90, the Court is empowered, upon the application of any person willing to take charge of any infant who

1 *Re Taylor*, 11 Sim. 178, 180.

2 *Re Taylor*, 11 Sim. 178, 200 ; *Re Halliday*, 17 Jur. 56, V. C. T. ; *Re Winecom*, 11 Jur. N. S. 297 : 12 W. R. 462, V. C. W.

3 Per Lord Cottenham, in *Wards v. Wards*, 2 Phill. 787, 788 ; and see *Re Winecom*, *ubi sup.*

4 *Ex parte Bartlett*, 2 Coll. 661, 664.

5 *Shillito v. Collett*, 8 W. R. 683, V. C. K. ; affirmed, *ib.* 696, L.J.J.

6 *Re Taylor*, *ubi sup.*

7 *Shillito v. Collett*, *ubi sup.*

8 *Re Winecom*, *ubi sup.*

9 *Corsealis v. Corsealis*, 1 Dr. & War. 235.

10 *Re Fynn*, 2 De G. & S. 457, 475 : 12 Jur. 713.

11 *Re Tomlinson*, 3 De G. & S. 571.

has been convicted of felony, and to provide for his maintenance and education, to assign the custody of such infant to such person, and to rescind or vary the terms of any such assignment; and, if it shall think fit, to award costs against any applicant: such costs to be payable to any parent or other 'natural or testamentary guardian who shall oppose such application.¹ The infant is not to be sent out of the jurisdiction of the Court;² and the execution of the sentence passed upon the infant is not to be interfered with.³

This Court will upon the petition of the guardian duly appointed by the Court of Probate or Surrogate, interfere summarily and order the person of the infant to be delivered into the custody of such guardian, when there is danger of the infant being removed out of the jurisdiction—although no suit is pending in Court respecting the infants' estate.⁴ Although the Court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shown that a compliance therewith would be prejudicial to the happiness and moral training of the infants.⁵ On a bill for alimony and the custody of children who are under twelve years of age, the Court has jurisdiction to grant the latter relief without a petition.⁶ Maintenance under our Statute can only be ordered where the infant is under twelve years of age, and is transferred by the Court to the mother's custody.⁷ There was a contest in a Surrogate Court between the stepfather and uncle for the guardianship of a child of ten or eleven years old: the child preferred her stepfather, and the Surrogate Court appointed him guardian: but this Court, on appeal, being satisfied from the evidence that it was for the real interest of the child that the uncle should be guardian, reversed the order below.⁸ The Court has an absolute right in its discretion to give the custody of a child under twelve years of age to the mother. The Court exercised this right where the only evidence that the parents were living apart through the fault of the husband was the evidence of the wife; holding,

1 3 & 4 Vic. ch. 90, sec. 1. No fee is to be taken by any officer of the Court, and counsel and solicitor may be assigned: *ib.* sec. 3. As to this Act, see *Chambers*, 178, 199; *Macpherson*, 133.

2 3 & 4 Vic. ch. 90, sec. 2.

4 *Re Gürie*, 3 Grant, 279.

6 *Munro v. Munro*, 15 Grant, 431.

8 *Re Irwin*, 16 Grant, 461.

3 *Ibid.*, sec. 4.

5 *Anonymous*, 6 Grant, 632.

7 *Re Eves*, 15 Grant, 560.

that the Court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable; and the Judge is not prepared to say that he disbelieves such statement.¹

Change of Solicitor.

Order 49 provides that "A party suing or defending by a solicitor shall not be at liberty to change his solicitor in any cause or matter without an order of the Court for that purpose, which may be obtained on *præcipe*; and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, or Deputy-Registrar with whom the pleadings are filed, the former Solicitor shall be considered the Solicitor of the party."

Where the plaintiff's Solicitor had been changed, and an order for such change served upon the defendant's Solicitor, who had acted under such change by serving the new solicitor with notice of filing bond for security for costs of appeals; an objection that a proceeding subsequently taken was not endorsed with the name and place of business of the new solicitor was overruled.²

Therefore, where a defendant had left his home, and had not been heard of, and the solicitor on the record had ceased to act for him, but no order for changing the solicitor had been obtained, it was held, that notices served on the former solicitor were duly served.³

The order of course to change a solicitor or agent is, like any other order of course,⁴ irregular, and will be discharged, if any material facts are suppressed: thus, where a country solicitor had agreed to employ a town agent for fifteen years, and before the expiration of the term obtained an order of course in a suit to change the agent, suppressing the existence of the special contract,⁵ and where the fact that the solicitor had been appointed by a deed was suppressed,⁶ the order was discharged. And where the plaintiff in a creditor's suit sold his debt after decree, and the

¹ *Re Davis*, 3 Cham. Rep. 277.

² *McDonnell v. U. C. Mining Company*, 2 Cham. Rep. 400.

³ *Wright v. King*, 9 Beav. 161; and see *Newton v. Thomson*, 16 Jur. 1006, V. C. T.

⁴ See *ante*.

⁵ *Richards v. Scarborough Market Company*, 17 Beav. 83; 17 Jur. 294.

⁶ *Jenkins v. Bryant*, 3 Drew. 70; 18 Jur. 902.

purchaser, in his name, and with his sanction, obtained an order of course to change solicitors, without disclosing these circumstances, the Court was of opinion that it was irregular, and that the proper course would have been for the purchaser of the plaintiff's debt to bring all the facts before the Court, on a motion to obtain the conduct of the cause.¹

Where, under an order of the Court, the costs of all parties had been paid, and the fund carried over to the separate account of a party, it was held that that party might present a petition for payment out, by a solicitor who had not been his solicitor in the cause, without having obtained an order to change.²

Where a person has employed a solicitor, and afterwards desires to prosecute the suit in person, an order must be obtained.³ Thus, where the plaintiff was a married woman, suing by her next friend, an order of course was obtained, upon the petition of the plaintiff and her next friend, giving the plaintiff and her next friend liberty to prosecute the suit in person, instead of prosecuting the same by her solicitor.⁴

If the solicitor of a party, or his London agent, dies, an order to appoint another solicitor need not be obtained; but a notice should be given to the Clerk of Records and Writs in whose division the cause is, and a similar notice served upon the solicitors of all the other parties to the cause.⁵

A solicitor, entering into partnership subsequently to his original appointment as solicitor of a party, does not render any order necessary; but the dissolution of partnership of a firm of solicitors operates as a discharge of the client:⁶ who is not obliged to employ any one of the late firm to continue his suit or defence; and if he does so, it seems that the usual course is to obtain an order on *præcipe*, appointing such member to be the solicitor in the place of the firm.⁷

¹ *Topping v. Searson*, 2 H. & M. 206.

² *Waddilove v. Taylor*, 12 Jur. 598, V. C. Wigram.

³ *Braithwaite's* Pr. 564.
⁴ *Moye v. Bateman*, 17 June, 1867, Rolls Lib. 1989. An address for service was set out in the order, and the names of the parties, and the address for service, were indorsed upon or subscribed to all subsequent proceedings: *Braithwaite's* Pr. 564.

⁵ *Braithwaite's* Pr. 564, 565; *Whalley v. Whalley*, 17 Jur. 254, V. C. W.

⁶ *Griffiths v. Griffiths*, 3 Haro, 587, 594: 7 Jur. 573; *Rawlinson v. Moss*, 7 Jur. N. S. 1053: 9 W. R. 733, V. C. W.; *Pulling's* Law of Attorneys, 112; and see *ante*.

⁷ See *Braithwaite's* Pr. 566; *Muttlebury v. Haywood*, 3 Jur. 1065, M. R.; *Pulling*, 112.

The executor or administrator of a deceased plaintiff, or any new plaintiff, need not employ the former solicitor in the cause; and a bill of revivor or supplemental bill, or order to revive, at the instance of a new party, will be received by the Record and Writ Clerks, and entered, without any order as to the solicitor; but where new parties thus come into the cause, pursuant to an order to revive, notice of the name and address of the solicitor acting for such new parties should be given to the Clerks of Records and Writs, and to the solicitors of all the other parties to the cause.¹ Where a party sues or defends in person and afterwards appoints a solicitor, an order is not necessary; but notice should be given to the Record and Writ Clerks.²

The effect of a change of solicitors on the lien upon a fund for costs, has already been considered.³

¹ *Brathwaite's Pr.* 566.

² *Ibid.*

³ *Ante.*

CHAPTER XLVIII.

THE STATUTORY JURISDICTION OF THE COURT.

Introduction.

This treatise has been hitherto devoted to the investigation of that part of the practice which relates to the original jurisdiction of the Court of Chancery. This practice is founded partly upon immemorial customs in the offices connected with the Court, partly upon the decisions of the Judges, the General Orders of the Court, and the Regulations of the Judges and Registrars, and partly upon direct provisions made by Acts of Parliament.¹ In many instances, where the legislature has thus conferred upon the Court additional means of enforcing its decrees and orders, the powers given for this object have been interwoven with the original practice : such statutes have, consequently, been already stated.² There are also other Acts of Parliament affecting, in various ways, the rights of property, and, therefore, incidentally, controlling and modifying the jurisdiction in Chancery ; but, although the construction of these Acts has frequently to be determined in Equity, they relate rather to the law than the practice of the Court, and do not therefore come within the object of this work.

Subject to these exceptions, it is intended, in this chapter, to review the Acts conferring additional powers upon the Court ; and to state whatever peculiarities there may be in the manner in which this statutory jurisdiction is carried into effect. In the first place, there is this material distinction between the manner in which the

¹ See *ante*.

² See *ante*, as to the following Imperial Acts :—Aliens (7 & 8 Vic. ch. 66), pp. 47, 48 ; Debts and Liabilities (18 & 14 Vic. ch. 35), p. 1095, *et seq.* ; English and Irish Decrees Enforcement (41 Geo. III. ch. 90), p. 1002, *et seq.* ; Exchequer in Equity Transfer of Jurisdiction (5 Vic. ch. 5), p. 5 ; Foreign Process (2 & 3 Will. IV. ch. 33 ; 4 & 5 Will. IV. ch. 82), p. 407 ; Infants' Marriage Settlements (18 & 19 Vic. ch. 43), p. 1234 ; Judgments (1 & 2 Vic. ch. 110 ; 2 & 3 Vic. ch. 11 ; 3 & 4 Vic. ch. 82 ; 18 & 19 Vic. ch. 15 ; 23 & 24 Vic. ch. 38 ; 27 & 28 Vic. ch. 112), p. 929, *et seq.* ; Marriages (4 Geo. IV. ch. 76 ; 19 & 20 Vic. ch. 119), pp. 10, 106, 1239 ; Petitions of Right (23 & 24 Vic. ch. 34), p. 130 ; Solicitors (6 & 7 Vic. ch. 73 ; 23 & 24 Vic. ch. 127), p. 1702, *et seq.* ; Special Cases (18 & 14 Vic. ch. 35), p. 1681, *et seq.* ; Stannaries Decrees Enforcement (18 & 19 Vic. ch. 32), p. 964.

powers and remedies incident to the original jurisdiction are called into operation, and the means by which orders under statutes are made: namely, that, in the former case, it is necessary, in almost all cases, that a bill should be filed, or a suit otherwise regularly instituted, before any relief can be obtained: whereas, in the latter case, it is usual for the Act of Parliament providing the additional remedy also to enact, that it may be obtained in a summary manner upon petition, motion, or summons.¹ In all such cases, the application should be entitled in the matter of the Act under which it is made;² and also in the matter of the particular trust or other subject to which it has reference.³

Where the application is directed by the act to be made to the Lord Chancellor, it may be, and usually is in the first place heard by one of the Vice-Chancellors;⁴ but it seems it cannot be made to the Master of the Rolls, unless he is named in the act.⁵

The Act itself frequently points out the precise relief which the applicant is ultimately entitled to receive. It was formerly usual for the statute to direct that the matter might be heard upon affidavit;⁶ but, owing to the changes in the system of taking evidence, this is no longer necessary; and the evidence in support of the application is adduced in the usual manner.

Orders made under the statutory jurisdiction are enforced in the same manner as orders made in a suit which has been regularly instituted.⁷

Statutes relating to Charities.

Generally.—In England before any suit, petition, or other proceeding (not being an application in which any person claims any property or seeks any relief adversely to any charity, and not being an application, in any suit or matter actually pending at the time the application is made), for obtaining any relief, order, or direction concerning

¹ See *ante*.

² *Re Law*, 4 Beav. 500, 510.

³ 1st Rep. Eng. & Ir. Com., App. 73. Where the jurisdiction is conferred by the statute, and the property sought to be affected forms the subject-matter of a suit or other proceeding, the application should be entitled both under the Act, and in such suit or proceeding.

⁴ *Re Carrow*, 8 Beav. 123; *Re Howard*, *ib.* 424, 426; *Re Taylor* 10 Sim. 201.

⁵ *Re Scott*, 12 Beav. 361, 363; *Meyrick v. Lawe*, 23 Beav. 440.

⁶ See *Ex parte Greenhouse*, 1 Swanst. 60.

⁷ See *ante*, and Ord. XLIX.

or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken by any person whomsoever (other than the Attorney-General,) he must obtain from the Board of Charity Commissioners an order or certificate, signed by their secretary, authorising or directing such proceeding to be taken: and no proceeding for obtaining any such relief, order, or direction as aforesaid will be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said Board.¹ This provision applies to applications made to the Court, although such applications are made under the authority of a special Act of Parliament.² It is not necessary to show that the Commissioners approve of the particular application; but only that it is made with their sanction.³

The sanction of the Commissioners is not, it seems, required, where a fund belonging to a charity has been paid into Court under the Trustee Relief Act;⁴ or the Lands Clauses Consolidation Act;⁵ nor was it required where an application was made to deal, for the purposes of a college, with an estate, of which part belonged to a school and the residue to the college.⁶ Where a final order has been made, and a scheme settled, the matter is no longer pending within the meaning of the provision above stated; and the sanction of the Commissioners must be obtained.⁷

The Statute 43 Eliz. ch. 4, commonly called the Statute of Charitable Uses, recites that "lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty and her most noble progenitors,

1 Charitable Trusts Act, 1853 (16 & 17 Vic. ch. 137), ss. 17, 18; *Re Lister's Hospital*, 6 De G. M. & G. 184; *Re Markwell*, 17 Beav. 618; *Re London, Brighton & South Coast Railway Company*, 18 Beav. 608; and see *Re Cheekum College*, 1 Jur. N. S. 905, V. C. W.; *Re Skeetes*, ib. 1037, V. C. K.; *Re St. Giles and St. George*, Bloomsbury, 25 Beav. 313; 4 Jur. N. S. 297; *Re Willenhall Chapel*, 2 Dr. & Sm. 467, 468.

2 *Re Bingley School*, 2 Drew. 238; 18 Jur. 688; and see *Re Watford Burial Board*, 2 Jur. N. S. 1046, V. C. W. 3 *Re Watford Burial Board*, *ubi sup.*

4 *Re St. Giles and St. George*, Bloomsbury, *ubi sup.*; but see *Re Markwell*, *ubi sup.*

5 *Re Lister's Hospital*, *ubi sup.*; but see *Re Cheekum College*, *Re London, Brighton & South Coast Railway Company*, and *Re Skeetes*, *ubi sup.*; *Re Feversham Charities*, 10 W. R. 391, V. C. W.

6 *Re Meyrick*, 1 Jur. N. S. 438, V. C. K.

7 *Re Ford's Charity*, 3 Drew. 324; *Re Jarvis' Charity*, 1 Dr. & Sm. 97; 5 Jur. N. S. 724.

as well by sundry other well-disposed persons: some for the relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans; some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers and other taxes: which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same."

This statute has become obsolete;¹ but the recital above set out is still important, inasmuch as the Court has reference to it, in deciding what is to be deemed a charitable purpose: for such purpose must be either one of those purposes denominated charitable in the above statute; or one which the Court construes to be charitable, by analogy, to those mentioned in that statute.²

Sir Samuel Romilly's Act.—When the statute of Elizabeth fell into disuse, the only mode by which any remedy could be obtained in Chancery for the abuse of a charity was by way of information.³ Under these circumstances, the statute usually called Sir Samuel Romilly's Act was passed. By that Act it is provided, that in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the

1 *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305; *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 17, 68; and for a detailed account of the effect of the statute and the decisions under it, see *Duke's Law of Charitable Uses*; *Shelford on Mortmain*, p. 276, *et seq.*; and see *Tudor's Charitable Trusts*, and *Finlason's Charitable Trusts Acts*.

2 *Kendall v. Granger*, 5 Beav. 300, 302: 6 Jur. 919; *Attorney-General v. Corporation of Shrewsbury*, 6 Beav. 220, 229: 7 Jur. 767.

3 *Ante*.

custody of the Great Seal, or Master of the Rolls for the time being, upon the petition of any two or more persons stating such complaint, and praying such relief as the nature of the case may require, to make such order therein, and with respect to the costs of such applications, as to him or them shall seem just; and that such order shall be final and conclusive, unless the party or parties who shall think himself or themselves aggrieved thereby, shall, within two years from the time when such order shall have been passed and entered, appeal from such decision to the House of Lords.¹ By a subsequent Act, the Attorney-General, acting *ex officio*, is empowered to make application, by petition, to the Court of Chancery, with respect to any charity, under the provisions of Sir Samuel Romilly's Act, or under the provisions of any Act or Acts passed, or to be passed, authorising the application to the Court by petition, according to the provisions of that Act.²

It has been held that the Court though it has jurisdiction, ought to consider, in all cases, whether it is fit to exercise that jurisdiction, or to put the party to file an information;³ and that, in cases of breach of trust, the jurisdiction ought to be confined to the simple case of abuse of a clear trust, not involving any question beyond the question of such abuse, and particularly not involving the interest of persons to whom abuse of trust could not be imputed.⁴ The Court has no power, under the Act, to repair a previous misapplication of trust funds.⁵

The Act has been held not to apply to cases of constructive trusts;⁶ or where different persons claim the trust property adversely to each other,⁷ and it is sought to obtain the decision of the Court as to which of them is entitled to the benefit of the charity;⁸ or where, although the object of the petition was a scheme for the management of the property, it appeared that there was a

¹ 52 Geo. III. ch. 101, sec. 1.

² Charitable Trusts Act, 1853 (16 & 17 Vic. ch. 137), sec. 43.

³ *Ex parte Rees*, 3 V. & B. 10; and see *Re Dean Clarke's Charity*, 8 Sim. 24, 42.

⁴ *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 17; Ld. Rep. 19; *Ex parte Skinner*, 2 Mer. 463; and see cases collected, 14 Beav. 120, n.; *Re Manchester New College*, 16 Beav. 610; 17 Jur. 540.

⁵ *Re Half's Charity*, 14 Beav. 115; and see cases collected, *ib.* 120, n.

⁶ *Ex parte Brown*, G. Coop. 295.

⁷ *Ex parte Rees*; and *Re Dean Clarke's Charity*, *ubi sup.*; *Re West Retford Church Lands*, 10 Sim. 105, 109; 3 Jur. 501.

⁸ *Re Dean Clarke's Charity*, *ubi sup.*; and see *Attorney-General v. Bishop of Worcester*, 9 Hare, 338; 10 Jur. 3.

dispute as to the persons in whom the legal estate was vested.¹ It has also been decided, that the Court had no jurisdiction to make an order upon petition, transferring the funds of a dispensary to a hospital, and amalgamating the two institutions.²

Where the object of the petition is the internal regulation of a charity, an application may be made under the statute;³ but if there is a visitor, and the matter concerning which the interference of the Court is sought belongs exclusively to his cognizance, then the complaint must be addressed to him, and no remedy can be obtained in the Court of Chancery.⁴

It has been held that the Court has jurisdiction under the Act: where the point to be decided is simply a question of law, depending on the construction of a particular instrument;⁵ where the objects of the charity have no distinct interests, and the Attorney-General, therefore, properly represents them all, and where, although there may be distinct interests, no substantial question of title can arise between the several objects of the charities;⁶ where there are no specific directions as to the application of the trust property, or it can not be advantageously applied in the execution of existing trusts;⁷ where it is sought to alter a scheme, which has been settled by a decree, and which might have been altered on an information;⁸ and where the question is as to the site of the charity.⁹

The Court may also, under the Act, declare the proportions in which different charitable objects are entitled to the funds;¹⁰ and may, where it appears that it will be for the benefit of the charity, direct a sale of part of the estates belonging to it.¹¹

1 *Re Phillipotts Charity*, 8 Sim. 381, 389; see also *Re West Retford Church Lands*, 10 Sim. 101, 109: 3 Jur. 501.

2 *Re Reading Dispensary*, 10 Sim. 118, 121: 3 Jur. 697.

3 *Re Shrewsbury School*, 1 McN. & G. 324, 331: 14 Jur. 259; *Re Manchester New College* 16 Beav. 610: 17 Jur. 640.

4 *Attorney-General v. Clare Hall*, 3 Atk. 674; *Ex parte Berkhamstead Free School*, 2 V. & B. 134, 144; *Thomson v. University of London*, 10 Jur. N. S. 609: 12 W. R. 733, V. C. K.

5 *Re Upton Warren*, 1 M. & K. 410, 415.

6 *Attorney-General v. Bishop of Worcester*, 9 Hare, 328: 16 Jur. 3; *Re Manchester College*, *ubi sup.*

7 *Re Shrewsbury School*, *ubi sup.*

8 *Attorney-General v. Bishop of Worcester*, *ubi sup.*

9 *Re Manchester New College*, *ubi sup.*

10 *Re Hall's Charity*, 14 Beav. 115: 15 Jur. 940; and see cases collected, 14 Beav. 120, n.

11 *Re Parkes' Charity*, 12 Sim. 323, 332; *Re Overseers of Ecclesall*, 16 Beav. 297; *Re Ashton Charity*, 22 Beav. 388.

Unless the application is made by the Attorney-General acting *ex officio*,¹ the petition must be presented by two or more persons :² who should have a direct interest in the charity ;³ and of whom two, at least, must be individuals : a corporation not being within the meaning of the Act ;⁴ and the Attorney or Solicitor-General must also signify his allowance or approbation of the petition, by affixing his signature to it.⁵ The Solicitor-General, however, can only act during the vacancy of the office of Attorney-General.⁶

Before such allowance can be obtained, the petition must be signed by the petitioners in the presence of their solicitor, and their signatures be attested by him ;⁷ and a certificate must also be obtained on the petition, and signed by the counsel who prepared the petition, to the effect that, in his opinion, the petition is one proper to be presented under the act. The solicitor for the petitioners must likewise certify on the petition that the petitioners are able to answer the costs of the application.⁸ Upon the petition, so signed and certified, being left with the Attorney-General's clerk, he will obtain the Attorney-General's signature thereto, in testimony of his approbation.

The petition may be addressed either to the Lord Chancellor or the Master of the Rolls ;⁹ and it is presented, and a copy left for the Judge, in the usual way ;¹⁰ but unless the petition is presented by the Attorney-General acting *ex officio*, or in a matter which is pending at the time of the application, the order or certificate of the Charity Commissioners authorising the application must also be previously obtained,¹¹ and produced, before the petition will be answered.

As a general rule, the petition ought to be served upon all persons whose interests will in any manner be affected by the order sought to be obtained.¹²

1 *Ante*.

2 *Re Bedford Charities*, 2 Swanst. 518.

3 *Re London, Brighton & South Coast Railway Company*, 18 Beav. 608.

4 52 Geo. III. ch. 101, sec. 2.

5 *Ex parte Skinner*, 2 Mer. 453.

7 52 Geo. III. ch. 101, sec. 2.

6 *Re Warwick Charities*, 1 Phil. 559.

9 *Ante*.

10 *Ante*.

11 *Ante*. *Re London, Brighton & South Coast Railway Company*, 18 Beav. 608 ; *Re Ford's Charity*, 3 Drew. 324 ; *Re Jarvis' Charity*, 1 Dr. & Sm. 97 ; 5 Jur. N. S. 724.

12 *Ex parte Rice*, 3 V. & B. 10 ; *Ex parte Seagears*, 1 V. & B. 495 ; see, however, *Re Warwick Charities*, 1 Phil. 559. As to service of petitions, see *ante*.

The petition, if addressed to the Lord Chancellor, is usually heard by one of the Vice-Chancellors, from whose decision an appeal¹ lies to the Court of Appeal in Chancery :² if the order is made in the first instance by the Master of the Rolls, no appeal lies to that Court ;³ and whether the order is made by that Court or the Master of the Rolls, an appeal may be presented to the House of Lords within two years from the time when the order has been passed and entered.⁴

The proceedings under this Act have the same effect, as if they were taken under an information.⁵ If a scheme is directed to be settled, or any other proceedings to be taken in the Judge's Chambers, the petitioners and respondents have a right to attend there ; and it seems, that it is not only the right, but also the duty, of the Attorney-General to interfere in the subsequent proceedings upon the petition, in any manner he may think for the public benefit.⁶ Under the present practice, the Attorney-General is always directed to be served with the summons to proceed on the order.⁷

Upon the return of the summons to proceed,⁸ directions will be given as to the manner in which the inquiries directed by the order are to be prosecuted, and the parties to attend thereon.⁹ A concise statement showing the object and property of the charity, is sometimes directed to be brought in and substantiated by affidavit or other evidence.

If trustees are directed to be appointed, evidence of the fitness of such of them as are not appointed *ex officio* is required ; and their written consent to act, verified by affidavit, must be produced, as in other cases.¹⁰

1 See *Re Upton Warren*, 1 M. & K. 410, 415 ; as to appeals from orders on petition, see *ante*.

2 As to appeals to this Court, see *ante*.

3 *Re Manchester New College*, 16 Beav. 610 : 17 Jur. 540.

4 52 Geo. III. ch. 101, sec. 1.

5 *Attorney-General v. Bishop of Worcester*, 9 Hare, 323 : 16 Jur. 3.

6 *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 1765 ; *Attorney-General v. Earl of Stamford*, 1 Phil. 737, 749 : 7 Jur. 859.

7 *Re Hanson*, 9 Hare, App. 54.

8 For the practice as to carrying in the order, and issuing a summons to proceed, see Ord. XXXV. 15, 16 *ante* ; and as to adjournments of petitions to Chambers, without any order being drawn up, see *ante*. For forms of orders, directing accounts and inquiries as to charities, see *Seton*, 362, *et seq.*

9 Ord. XXXV. 16 ; *ante*.

10 *Ante*. As to appointing and removing trustees of charities, see *Seton*, 361, *et seq.*

Where a scheme is directed, it is usually prepared by the petitioners, and submitted by them to the Attorney-General: who makes such suggestions or alterations as he thinks fit.¹ A fair copy of the scheme, showing any alterations which may not have been agreed upon between the parties, is then left at the Chambers of the Judge; and the scheme is then settled by him, either in Chambers, or on an adjournment into Court.² When finally settled, a fair copy is signed by the Judge, and filed in the Report Office: whence office copies may be obtained. The final order usually refers to the scheme as filed; and, in this manner, the expense of setting out the whole scheme in the order is avoided.³

When the inquiries are answered, if the further consideration of the petition has not been adjourned, an order will be made in Chambers, appointing the trustees and approving the scheme, or as may be required by the circumstances of the case; and giving such consequential directions, as to costs or otherwise, as may be necessary.⁴ If, however, the further consideration is adjourned, the Chief Clerk makes his certificate of the result of the proceeding: which is completed, and may be discharged or varied, as in other cases;⁵ and the petition may then be brought on again in Court for consequential directions, in the manner before explained.⁶

Charitable Trusts Acts.—The summary jurisdiction of the Court over charities has been greatly enlarged by the Charitable Trusts Acts, 1853, 1855, and 1860;⁷ but the power of the Attorney-General to proceed *ex officio* is preserved; and his fiat or allowance is still required, 'with respect to any proceeding not being an application under the jurisdiction thereby created: where such fiat or allowance was previously necessary.'⁸

By "The Charitable Trusts Act, 1853," where the appointment or removal of any trustee, or any other relief, order, or direction relating to any charity, of which the gross annual income for the

1 *Re Hanson*, 9 Hare, App. 54; *Re Wyersdale School*, 10 Hare, App. 74; *Seton*, 360. As to schemes, see *ib.* 380-382.

2 As to adjournment into Court, see *ante*.

3 *Re Conyers School*, 10 Hare, App. 5; *Seton*, 347; and for form of order, see *ib.* Nos. 1, 2.

4 For forms of orders, see *Seton*, 347 *et seq.*; and as to costs in charity cases, see *ib.* 350, 351, 363 *Morgan & Davey*, 138, *et seq.*

5 See *ante*.

6 *Ante*. For forms of orders, see *Seton*, 347, *et seq.*

7 16 & 17 Vic. ch. 137; 18 & 19 Vic. ch. 124; 23 & 24 Vic. ch. 136.

8 16 & 17 Vic. ch. 137, sec. 13.

time being exceeds thirty pounds, is considered desirable, and such appointment, removal, or other relief, order or direction might, before the Act, be made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, any person authorised in that behalf by the order or certificate of the Charity Commissioners,¹ or the Attorney-General, may make application (without any information, bill or petition) to the Master of the Rolls or one of the Vice-Chancellors sitting at Chambers, for such order, direction, or relief as the nature of the case may require; and the Judge to whom any such application shall be made may proceed upon and dispose of such application in Chambers, save where he may think fit otherwise to direct, and may exercise thereupon all such jurisdiction, power and authority, and make such orders and give such directions in relation to the matter of such application, as might, at the passing of the Act, be exercised, made or given by the Court of Chancery, or by the Lord Chancellor, intrusted as aforesaid, in a suit regularly instituted or upon petition, as the case may require: and the Judges respectively have, in relation to such applications, and the proceedings thereon (subject to any rules which may be made by the Lord Chancellor, with the advice and consent of them or any two of them,²) all such powers of directing matters to be heard in open Court, and of ordering what matters shall be heard and investigated by themselves and their Chief Clerks respectively, and such other powers and authorities, as by the Stat. 15 and 16 Vic. ch. 80 are vested in or authorised to be exercised by them at Chambers;³ and the provisions of the last-mentioned Act applicable to orders made by the Judges at Chambers extend to all orders made under this Act.⁴ It is, however, provided that the Judge may, if he thinks fit, direct that the proceedings shall be taken by information, bill, or petition, according to the then existing practice;

¹ *Ante*.

² See 16 & 17 Vic. ch. 137, sec. 31; and see Ord. XLI. 10-13.

³ As to the jurisdiction and practice at Chambers, see *ante*.

⁴ 16 & 17 Vic. ch. 137, sec. 28; and see *Re Davenport's Charity*, 4 De G. M. & G. 839. By the 23 & 24 Vic. ch. 136, sec. 2, the Charity Commissioners may, upon the application of any person authorised under 16 & 17 Vic. ch. 137, sec. 43, to apply for a like purpose (see *post*), make such orders as may be made by the Judge at Chambers for the appointment or removal of trustees of any charity, or for the removal of any schoolmaster, mistress, or other officer thereof, or relating to the assurance, transfer, payment, or vesting of any real or personal estate belonging thereto, or entitling the official trustees of charitable funds, or any other trustees, to call for a transfer of, and to transfer, any stock belonging to such estate, or for the establishment of any scheme for the administration of any such charity. As to appeals from such orders, see *post*.

and may abstain from further proceeding on the application ;¹ and that no Judge of the Court of Chancery shall, upon any proceedings under the Act, have jurisdiction to try or determine the title at Law or in Equity to any real or personal property, or any term, or interest therein, as between any charity, or the trustee thereof, and any person holding or claiming such real or personal property, term, or interest adversely to such charity, or to try or determine any question as to the existence or extent of any charge or trust.²

If the charity is within the jurisdiction of the Court of Chancery of the county palatine of Lancaster, and the gross annual income exceeds £30, the Chancellor of the duchy and county palatine, and the Vice-Chancellor of the county palatine, have concurrent jurisdiction with the Judges of the Court of Chancery.³

If the charity is established, or administered, or applicable to or for objects or purposes within the city of London, the before-mentioned provisions apply, although the gross annual income thereof does not exceed £30.⁴

Where the gross annual income does not exceed £50., the jurisdiction is exercised by the District Court of Bankruptcy or County Court of the district of the charity ;⁵ but the Charity Commissioners may direct that the application shall be made before a Judge of the Court of Chancery, or the Chancellor or Vice-Chancellor of the county palatine of Lancaster, according to the provisions applicable to a charity the gross annual income whereof exceeds £30.⁶

Wherever it appears to the Charity Commissioners requisite or desirable that legal proceedings should be instituted by the Attorney-General with respect to any charity, or the estates, funds, property, or affairs thereof, they may certify such case to him, together with such statements and particulars as in their opinion may be requisite or proper for the explanation of the case ; and thereupon the Attorney-General is (if he thinks fit,) to institute and prosecute such legal proceedings as he may consider requisite or proper, by

1 16 & 17 Vic. ch. 137, sec. 23.

4 16 & 17 Vic. ch. 137, sec. 30.

6 16 & 17 Vic. ch. 137, sec. 35.

2 *Ibid.* sec. 41.

5 *Ibid.* sec. 32, as amended by 23 & 24 Vic. ch. 136, sec. 11.

3 *Ibid.* sec. 29.

information or petition, or by application to the Judge at Chambers, or other Court having jurisdiction under the Act.¹

The application to the Judge at Chambers may be made by the Attorney-General, or by all or any one or more of the trustees or persons administering or claiming to administer, or interested in the charity, or any two or more inhabitants of any parish or place within which the charity is administered or applicable.²

The application is made by summons, in the form used for originating proceedings.³ The summons should be intituled in the matter of the charity, as described in the certificate authorising the application, and also in the matter of the Charitable Trusts Acts, and of any other special Acts, such as the Trustee Acts, conferring jurisdiction in the particular case; and should state the precise object of the application. At the time the summons and duplicate are issued at Chambers,⁴ a copy certified by the solicitor of the applicant, of the order or certificate of the Charity Commissioners authorizing the application,⁵ must (unless the application is made by the Attorney-General acting *ex officio*), be left at the Judge's Chambers; and at the time of sealing the summons and filing the duplicate at the Record and Writ Clerks' Office,⁶ the applicant's solicitor should file a written authority from the applicant to make the application, and a certificate by himself that the applicant is able to pay costs.⁷

Unless the application is confined to the appointment of trustees and any vesting order, or order for the transfer of stock, consequent thereon, a copy, sealed for service, of the summons must be served on the Attorney-General, where he is not the applicant; and, as a general rule, similar copies must, in every case, be served on persons whose interests will be affected by the order sought to be obtained. The Commissioners by their certificate sometimes direct

1 16 & 17 Vic. ch. 137, sec. 20. The Commissioners may also order the bill of costs of any solicitor for business done on behalf of a charity or the trustees thereof to be taxed by the Taxing Masters of the Court, 18 & 19 Vic. ch. 124, sec. 40; *ante*.

2 16 & 17 Vic. ch. 137, sec. 43.

3 Ord. XL. 10. For form of summons, see B. Sched. K. No. 1.

4 For the practice as to preparing, issuing, and serving a summons originating proceedings, see *ante*.

5 *Ante*.

6 *Ante*.

7 This practice is not, however, now adhered to.

to whom notice of the application is to be given; and if the application is for the establishment or alteration of a scheme, or the appointment or removal of any trustees or trustee, notice in writing of such intended application must be given, in such form and manner as the Charity Commissioners may direct; and where the notice is directed to be affixed to or near the door of any parish or district church, the incumbent and churchwardens are to allow such notice to be affixed and remain so affixed during such period, not less than fifteen days, as the Commissioners may have ordered; and whenever it has been ordered that such notice shall be affixed to any place, evidence that the same has been so affixed is to be deemed *prima facie* evidence that it has remained so during the prescribed time.¹

On the return of the summons, or at an adjournment thereof, the object of the application, and the evidence adduced in support of or in opposition to it, will be considered; and where the application seeks the appointment of trustees, or the settlement of a scheme, the course of procedure is the same as that before described.² On the proceeding being brought to a conclusion, the Chief Clerk sends to the Registrar a minute of the order made: and the order is drawn up and completed by him in the usual way.³

Where any land, or any term or estate therein, holden upon trust for any charity, is vested in any persons other than the persons acting in the administration and application of the rents—or where there are no trustees thereof, or the trustees, or any of them, are unwilling to act, or it is uncertain in whom such land, term, or estate is vested, or all or any of the persons in whom such land, term, or estate is vested cannot be found, or are under age, lunatic, or of unsound mind, (whether found such by inquisition or not,) or otherwise incapable of acting, or are out of the jurisdiction, or not amenable to the process of the Court of Chancery—or where, by reason of the reduced number of trustees or other causes, a valid appointment of new trustees cannot be made—or where, by reason of the expenses incident to the appointment of new trustees, and the conveyance or assignment of such land,

¹ 16 & 17 Vic. ch. 137, sec. 42.

² *Ante*.

³ *Ante* For a collection of orders under the Charitable Trusts Acts, with notes, see *Seton*, 723, et seq.; and see *ib.* 347, et seq.

term, or estate, to such new trustees, it shall appear to the Court of Chancery, or to any Judge thereof, desirable so to do—such Court or Judge may order that such land, term, or estate, be vested in the Official Trustee of Charity Lands; and thereupon the same is to vest in such official trustee and his successors, for all the estate and interest holden in trust for the charity, without any conveyance or assurance thereof; but no such vesting order is to be made in respect of any land, or term, or estate, as aforesaid, holden in trust as aforesaid, vested in a corporation, without the consent of the corporation; and no such vesting order is to take effect in respect of any copyhold land, without the consent of the lord of the manor, and the Court or Judge may direct such periodical or other payment, as the Court or Judge may think fit, to be made to the lord of the manor, in compensation for fines or other profits which would have become due upon death or admittance of tenants.¹

Any Court or Judge by whom any such vesting order may have been made, or any other Court or Judge having jurisdiction in the matter, may, if it shall so seem fit to such Court or Judge, from time to time order that all or any part of the land, term, or estate, which shall for the time being be vested in the Official Trustee, by virtue of any such vesting order, shall be divested, and vested in the acting trustees or trustee for the time being of the charity; and such last-mentioned order is to operate to vest such land, term, and estate, in the trustees or trustee therein named, without any conveyance or assurance.²

The Official Trustee of Charity Lands is to be deemed a bare trustee; and is to permit the persons acting in the administration of the charity to have the possession, management, and control of the trust estates, and the application of the income thereof, as if the same had been vested in them, unless the Court or Judge otherwise directs.³

The Court or Judge may, whenever it shall appear that, for the purpose of security or the convenient administration of the charity,

1 16 & 17 Vic. ch. 137, sec. 48, as amended by 18 & 19 Vic. ch. 124, sec. 15. For forms of orders, see *Seton*, 349, No. 8; 783, No. 3.

2 16 & 17 Vic. ch. 137, sec. 49, as amended by 18 & 19 Vic. ch. 124, sec. 15; *Re Davenport's Charity* 4 De G. M. & G. 889.

3 16 & 17 Vic. ch. 137, sec. 60, as amended by 18 & 19 Vic. ch. 124, sec. 15.

any annuities, stocks, shares, or securities held in trust for the charity, or for the purpose of discharging any legacy or charge given or made to or for the benefit of the charity, ought to be transferred or deposited to or with the Official Trustees of Charitable Funds, order such transfer or deposit to be made; and may authorise such trustees to call for a transfer of and to transfer such stock or shares; and may order the payment to such trustees of any principal monies of any charity, under the same circumstances in which the transfer of stock to them may be ordered; and may empower them also to receive and recover, in trust for the charity to which the same shall belong, all dividends, interest, and income accrued from any such annuities, stock, or securities, respectively, and which shall for the time being be in arrear.¹

Copies of all orders made by any Court or Judge for any transfer, deposit, or payment of stock, shares, securities, or monies to or by the Official Trustees, are to be forthwith transmitted to the Commissioners, by the parties obtaining such orders.²

No order made under the Act by the Judge at Chambers is subject to appeal where the gross annual income of the charity does not exceed £100: unless the Judge by whom such order is made certifies that such appeal ought to be permitted, either absolutely or on such terms as he may think fit to impose.³

The fees payable on proceedings before a Judge in Chambers under the Act are the same as the fees payable according to the general orders of the Court⁴ in respect of other proceedings commencing by summons; and are, in all other respects, regulated by the same orders; and where the Judge directs that any matter commenced by summons under the Act shall be heard in open Court, the same fees are payable, and the same costs allowed, as would have been payable in respect of any other matter so heard.⁵

¹ 16 & 17 Vic. ch. 137, sec. 51; 18 & 19 Vic. ch. 124, ss. 12, 13; 23 & 24 Vic. ch. 136, sec. 12. By 16 & 17 Vic. ch. 137, sec. 51, trustees were empowered, on obtaining an order of the Court, to transfer or pay any charity funds to the official trustees. This may now be done under an order obtained from the Charity Commissioners: 18 & 19 Vic. ch. 124, sec. 22. For forms of orders, see *Seton*, 784, *et seq.*

² 18 & 19 Vic. ch. 134, sec. 26

³ 16 & 17 Vic. ch. 137, sec. 28; Ord. XLI. 13.

⁴ That is to say, Ord. XXXVIII. and XXXIX.

⁵ Ord. XLI. rr. 11, 12.

The Court of Chancery has an appellate jurisdiction, in the case of orders made under the Act by a District Court of Bankruptcy or a County Court. The appeal may be brought by any person authorised to make any application under the Act, or any other person who may have been made a party to any proceeding upon any application thereunder.

Every appellant, other than the Attorney-General acting *ex officio*, must, however, within one calendar month after the making of the order complained of give notice in writing to the Court below and to the Commissioners of his desire to appeal; and if the Commissioners think it proper that such appeal should be entertained, and give a certificate to that effect, the Court below is to suspend any proceedings upon the order appealed against; and the Commissioners may require the person giving such notice to become bound, by a bond (which is exempt from stamp duty,) with two sufficient sureties, in such sum as the Commissioners may think reasonable, to pay such costs of the proceedings on the appeal as may be ordered to be paid by the appellant; and also (if the Commissioners so think fit,) to indemnify the charity against the costs and expenses of or attending the appeal. An appeal by the Attorney-General must be lodged within three calendar months after the making of the order complained of.¹ In other cases, the petition of appeal must be presented within three calendar months from the date of the order allowing the appeal.²

The petition must set forth the order appealed against, and the order allowing the appeal; and pray such relief as the case may require; and upon the hearing of such petition, the Court may confirm, vary, or reverse the order appealed against, or may remit such order to the District Court of Bankruptcy or County Court by which the same was made, with or without any declaration or directions in relation thereto; or may proceed, in relation to the charity to which such order relates, as in the case of an application under the Act to a Judge of the Court at Chambers; and any Judge sitting at Chambers or in open Court may make or give any such orders or directions, in relation to the matter of such order,

¹ 16 & 17 Vic. ch. 157, sec. 39.

² *Ibid.* ss. 39, 40. By the expression "order allowing the appeal," it is conceived that the certificate mentioned in s. 39 is intended;

as he may see fit : or the Court may make such other order, in relation to the matter of any such appeal, as to the Court may seem just, and as might be made in the case of a suit regularly instituted, or a petition, as the case may require ; and in case the party allowed to appeal does not within such three calendar months present such petition of appeal, the order against which such appeal was allowed is to be final ; and in case any costs, adjudged on any such appeal to be paid by the party allowed to appeal, are not paid, the bond may be put in suit ; and the money to be recovered thereon is to be applied to indemnify the charity estate, or the person damnified, or otherwise in such manner as the justice of the case may require, and the Court or Judge by whom such appeal may have been heard shall think fit.¹

The Charity Commissioners may, in case they disapprove of any order or decision of any District Court of Bankruptcy or County Court for the appointment or removal of any trustee of any charity, or approving of any scheme for regulating or directing the administration of any charity, or the estate, funds, property, or income thereof, submit the same to the consideration and decision of a Judge of the Court of Chancery ; or they may remit the same for reconsideration by the District or County Court ; and in case the Commissioners are dissatisfied with the order of the District or County Court on the reconsideration of the matter, they may refer such orders and the subject-matter thereof to a Judge of the Court of Chancery ; or, as to any charity within the jurisdiction of the Court of Chancery of the county palatine of Lancaster, either to the Chancellor or the Vice-Chancellor thereof, or to a Judge of the High Court of Chancery ; and where any order or decision is so referred, the Judge has and may exercise all such jurisdiction, power, and authority in relation thereto, as in the case of a charity the gross annual income whereof exceeds £80 ; and may make such order in relation to the matter of such order or decision as to him may seem proper.²

For the purposes of determining the jurisdiction under the Act, with respect to any charity, or the right to appeal from the deter-

1 16 & 17 Vic. ch. 137, sec. 40 : and see, for an appeal under this section, *Re Donington Church Estate*, 6 Jur. N. S. 290 ; 8 W. R. 301, V. C. S.

2 16 & 17 Vic. ch. 137, sec. 37.

mination of a Judge of the Court of Chancery, a statement in any certificate or order of the Commissioners that, according to their judgment, the gross yearly income of any charity does or does not exceed £30 or £100, as the case may be, is sufficient evidence of the amount of such income.¹

The Attorney-General, or any person authorised by him or by the Commissioners, in the case of any charity, whatever may be the yearly income of its endowments. and any trustee or person acting in the administration of or interested in any charity of which the gross annual income (exclusively of the yearly value of any buildings or land used wholly for the purposes thereof, and not yielding any pecuniary income,² shall exceed 50*l.*, or any two inhabitants of any parish or district in which the same shall be specially applicable, may, within three calendar months next after the definitive publication³ of any order of the Commissioners appointing or removing a trustee or trustees, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate, or establishing a scheme for the administration of the charity, present a petition to the High Court of Chancery, in a summary way, appealing against such order and praying such relief as the case may require; and any schoolmaster or schoolmistress, or other officer removed by the order of the Board, without the concurrence of the trustees or governors acting in the administration of the charity, or a majority of them, and without the approval of a special visitor, if any, of the charity, may within two calendar months (next after his or her removal,) appeal in like manner against the order of removal; and the Court, upon or before the hearing of any such petition of appeal, or at any stage of the proceedings, may require, if it shall think fit, from the Commissioners, their reasons for making the order appealed against, or for any part of such order, and may remit the same to them for reconsideration, with or without any declaration in relation thereto; or may make any substitutive or other order, in relation to the matter of the appeal, as it shall think just; and the Court may make any order respecting the costs, charges, or expenses incident to the appeal, and may also, before hearing or proceed-

¹ 16 & 17 Vic. ch. 137, sec. 44.

² 23 & 24 Vic. ch. 136, sec. 4.

³ See *Re Hackney Charities*, 10 Jur. N. S. 941; 12 W. R. 1129, M. R.; and see S. C. on appeal, 11 Jur. N. S. 126; 13 W. R. 398.

ing with the same, require from any appellant, other than the Attorney-General, proper security for such costs, charges, and expenses as may be eventually payable by him; but no such petition of appeal is to be presented by any person, other than the Attorney-General, before the expiration of twenty-one days after written notice, under the hand of such appellant, of his or her intention to present such petition, shall have been delivered to the Commissioners at their office.¹

The Attorney-General, or any person authorised by him or by the Commissioners, may appear as the respondent upon any such appeal; and the Court may make any order respecting the costs charges, and expenses of the Attorney-General or other respondent.²

There is no appeal, under these provisions, at the instance of two of the inhabitants of a parish, in the case of a charity the annual income of which is under 50*l.*, without the sanction of the Attorney-General or the Charity Commissioners.³

If any person refuses or wilfully neglects to comply with any lawful requisition or order of the Commissioners, or destroys or withholds any document required to be produced or transmitted by him, or to answer any lawful questions or inquiries, or to attend in obedience to any lawful precept of, or give evidence before any inspector, or if any person wilfully alters, destroys, withholds, or refuses to produce any document which may be lawfully required to be produced before any inspector, every person so offending is to be deemed and taken to be guilty of a contempt of the Court of Chancery, and is liable to be attached and committed on summary application by the Commissioners to the Court, or any Judge thereof; and may be ordered to pay the costs of and attending such contempt; and the Court may, at any time, discharge such person, upon such terms as it may deem just.⁴

Any question or dispute among the members of any charity, whether within or exempted from the operation of the Act, in rela-

1 23 & 24 Vic. ch. 136, sec. 8.

2 23 & 24 Vic. ch. 136, sec. 9.

3 *Re Hackney Charities*, 11 Jur. N. S. 126: 13 W. R. 398, L.J.J.; overruling 8 C. 10 Jur. N. S. 941: 12 W. R. 1120, M. R.

4 16 & 17 Vic. ch. 137, sec. 14; 18 & 19 Vic. ch. 124, sec. 9; 23 & 24 Vic. ch. 136, sec. 20. As to contempts and enforcing orders, see *ante*.

tion to any office, or the fitness or disqualification of any trustee or officer, or his election or removal, or generally in relation to the management of the charity, may be referred to the Commissioners by two-thirds of the members present at a special meeting, duly convened by notice for the purpose, in the same manner in which meetings of such charity are by the rules thereof appointed to be held and convened; and their award is final, and may be made a rule of the Court of Chancery.¹

For the purposes of the Acts the word "charity" is defined to mean: every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview, or interpretation of the Stat. 43 Eliz. ch. 4,² or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction;³ but the Acts do not extend to the Universities of Oxford, Cambridge, London, or Durham, or any college or hall in the said universities of Oxford, Cambridge and Durham, or the Colleges of Eton and Winchester, or any cathedral, or collegiate church; nor to any building registered as a place of meeting for religious worship, and *bona fide* used for that purpose; nor to the Commissioners of Queen Anne's Bounty; nor to the British Museum; nor to any friendly or benefit society, or savings bank, or any institution, establishment, or society for religious or other charitable purposes, or the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions; nor to any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions, and partly by income arising from any endowment, the provisions of the Acts, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or

1 16 & 17 Vic. ch. 187, sec. 64; 18 & 19 Vic. ch. 124, sec. 46. As to making awards rules of Court, see *post*.
2 See *ante*.
3 16 & 17 Vic. ch. 187, sec. 66.

appropriation has been directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscription, is subject to the provisions of the Acts; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription which is or may be from time to time set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some definite and specific object or purpose connected with such charity, in pursuance of any rule or regulation made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, is subject to the provisions of the Acts; and the Acts do not apply to the funds or property of any missionary or other similar society, or the missionaries, teachers or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales; but the exemption does not extend to any cathedral, collegiate, chapter or other schools.¹ The Commissioners may, however, on the petition of any exempted charity, make an order that it be bound by the provisions of the Act.²

Where any real or personal estate is given, partly upon lawful and partly upon unlawful charitable trusts, for the exclusive benefit of Roman Catholics, the Court or Judge at Chambers may, in exercise of the jurisdiction created by the Charitable Trusts Act, 1853, on the application of the Attorney-General or of any person authorized by a certificate of the Charity Commissioners,³ apportion the property or income so that a proportion thereof, to be fixed by the Court or Judge, may be exclusively subject to the lawful trusts, declared by the donor or settlor, and the residue thereof may become subject to such lawful charitable trusts for the benefit of Roman Catholics as the Court or Judge may consider, under the circumstances, to be most just; and may, by the same or any other order or orders, establish a scheme for giving effect thereto; and may ap-

1 16 & 17 Vic. ch. 137, sec. 62; 18 & 19 Vic. ch. 124, sec. 49; *Governors of the Charity for Widows and Children of Clergymen v. Sutton*, 27 Beav. 651; S. C. non. *Corporation of the Sons of the Clergy v. Trustees of the Stock Exchange*, 6 Jur. N. S. 84.

2 16 & 17 Vic. ch. 137, sec. 63.

3 See ante.

point trustees for the administration of the several portions of the property; and may vest the estate in the trustees.¹

No provision contained in any Act of Parliament, or decree or order, for the appointment or removal of trustees of any charity, or for or relating to the sale, exchange, leasing, disposal, or improvement of any property, by or under the order, or with the approval of the Court of Chancery, is (in the absence of any express direction to the contrary contained in any Act of Parliament, order, or decree subsequent to the 7th August, 1862,) to exclude or impair any jurisdiction or authority which might otherwise be properly exercised for the like purposes by the Charity Commissioners.²

Grammar School Act.—By the Grammar School Act,³ the Court is empowered to extend the system of education, and to regulate the right of admission into any grammar School, and to establish schemes for the application of its revenues; but regard is to be had to the intentions of the founder, and the manner in which the school has been conducted;⁴ and unless the revenues are insufficient, the teaching of Greek or Latin is not to be dispensed with, or to be treated otherwise than the principal object of the foundation; nor is any provision relating to the qualification of any schoolmaster to be dispensed with.⁵ Any extension of the right of admission is to be qualified, so as not to prejudice existing rights.⁶ The standard of admission is not to be lowered;⁷ and as far as possible the character of the school, and the qualifications of the masters, are to be maintained.⁸ In the appointment of additional masters, the original qualifications are to be maintained as far as possible; and any existing rights of patronage are preserved.⁹ The appointment of any master made after 7th August, 1840,¹⁰ is to be subject to the Act;¹¹ and the period on which the right of nomination of a master would lapse is, on the first avoidance of the office which may take place after the 7th August, 1840, to be computed from the time of

1 23 & 24 Vic. ch. 134, sec. 1; and see 16 & 17 Vic. ch. 137, sec. 62; 18 & 19 Vic. ch. 124, sec. 47; *Re Blundell*, 8 Jur. N. S. 5; 10 W. R. 34, M. R.

2 25 & 26 Vic. ch. 112.

3 3 & 4 Vic. ch. 77, sec. 1. For cases under the Act, see *Re Marlborough School*, 7 Jur. 1047 L. C.; *Re Chelmsford School*, 1 K. & J. 543; 3 Eq. Rep. 517; see also *Attorney-General v. Bishop of Worcester*, 9 Hare, 323.

4 3 & 4 Vic. ch. 77, sec. 1.

5 3 & 4 Vic. ch. 77, sec. 3.

6 3 & 4 Vic. ch. 77, sec. 3.

7 3 & 4 Vic. ch. 77, sec. 3.

8 3 & 4 Vic. ch. 77, sec. 3.

9 3 & 4 Vic. ch. 77, sec. 3.

10 *Ibid.* sec. 8.

11 The date of the passing of the Act.

5 *Ibid.* sec. 2.

8 *Ibid.* sec. 4.

9 *Ibid.* sec. 5.

settling the new statutes, or, if no proceedings are then pending to establish new statutes, from the time within which proceedings might be commenced.¹

Where the several schools are in one place, and the revenues of any are insufficient; they may, with the consent of the visitor, patron, and governors, be ordered to be united.²

The Court may enlarge the powers of the visitor where they are insufficient;³ and, if there is no visitor, may authorize the Bishop of the Diocese to visit the school.⁴ In case the visitor refuses or neglects to act, the Court may substitute a person to act as visitor *pro hac vice*,⁵ and may empower the visitor or Governors to remove any master.⁶ If the Crown is the patron, the Lord Chancellor, or the Chancellor of the Duchy of Lancaster, are to be the patrons of the school for the purposes of the Act.⁷

Applications to the Court under the Act are only made by petition under the 52 Geo. III. c. 101;⁸ but wherever there is any special visitor appointed by the founder, or other competent authority, opportunity must be given him to be heard previously to any decree or order being made.⁹ The petition ought to be served on the patron and the master of the school.¹⁰

The Act preserves the jurisdiction of the Ordinary; and does not extend to the Universities of Oxford or Cambridge, or to any college or hall within the same, or to the University of London, or any college connected therewith, or to the University of Durham, or to the Colleges of St. David's or St. Bees, or the Grammar Schools of Westminster, Eton, Winchester, Harrow, Charter House, Rugby, Merchant Tailors, St. Paul's, Christ's Hospital, Birmingham, Manchester, or Macclesfield, or Louth, or such schools as form part of any cathedral or collegiate church.¹¹

In the construction of the Act, the words "Grammar School" are to mean and include all endowed schools, whether of royal or other foundation, founded, endowed, or maintained for the purpose

¹ 3 & 4 Vic. ch. 77, sec. 12.

⁵ *Ibid.* sec. 16.

⁸ *Ibid.* sec. 21; see *ante*.

¹⁰ *Re Marlborough School*, 7 Jur. 1047, L. C.

² *Ibid.* sec. 9.

⁶ *Ibid.* sec. 17.

³ *Ibid.* sec. 14.

⁷ *Ibid.* sec. 22.

⁹ 3 & 4 Vic. ch. 77, sec. 1.

¹¹ 3 & 4 Vic. ch. 77, sec. 24.

⁴ *Ibid.* sec. 15.

of teaching Latin and Greek, or either of such languages, whether in the instrument of foundation or endowment, or in the statutes or decree of any Court of Record, or in any Act of Parliament establishing such school, or in any other evidences or documents, such instruction is expressly described, or is described by the word "grammar," or any other form of expression which may be construed as intending Greek or Latin, and whether by such evidences or documents, or in practice, such instruction is limited exclusively to Greek or Latin, or extended to both such languages, or to any other branch or branches of literature or science in addition to them or either of them; and the words "Grammar School" are not to include schools not endowed, but include all endowed schools which may be Grammar Schools by reputation, and all other charitable institutions and trusts, so far as the same may be for the purpose of providing such instruction as aforesaid.¹

Under the present practice, the jurisdiction conferred by the last-mentioned Act may be exercised under the Charitable Trusts Acts; and, accordingly, the Act is seldom resorted to.²

Church Building Amendment Act.—By the Church Building Acts Amendment Act, power is given to the Court of Chancery to apportion, between the new parishes or districts to be created under those Acts and the remaining part of the parish or place out of which they are created, any charitable devises, bequests, or gifts which may have been made to or given for the use of such parish or place, or the produce thereof; and to direct that the apportioned part shall be distributed by the incumbent or spiritual person serving the church, or by the churchwardens of the separate parish or district, either jointly or severally; and the Court is also empowered to apportion any debts or charges which may have been, before the period of the apportionment, charged upon the credit of any church rates in such parish or place; and all such apportionments are to be registered in the Registry of the Diocese in which such parish or place is situate, and duplicates are to be deposited with the churchwardens of such parish or place; but in all such cases, the costs are to be in the discretion of the Court; and such

¹ 3 & 4 Vic. ch. 77, sec. 25; and see *ib.* for the construction of the words: visitor, governors, trustees, statutes, schoolmaster, master, under-master, discipline, and management, as used in the Act.

² See *ante*.

apportioned debts or charges are to be raised and paid by the parish or place in which they may be apportioned, in such manner as the entirety was to be raised and paid, or as the Court may direct; and when any securities have been given for the same, the Court may order new securities to be given for the apportioned debts by such persons and bodies as the Court may direct; and all securities are to be valid and binding.¹

This power is exercised on petition, according to the 52 Geo. III. c. 101,² of any two persons resident in such parish or place;³ and the petition should be entitled in the matter of both Acts.⁴

The Court has a discretion under the Act; and in exercising that discretion, it should be guided by the consideration whether the administration of the charity is or is not affected by the division of the parish into districts, to the prejudice of the inhabitants of the new district.⁵ Where a ward of a parish has been divided into districts, gifts made to it may be apportioned under the Act.⁶

By the Charitable Trusts Amendment Act, 1855, a similar power of apportioning parochial charities has been conferred on the Charity Commissioners, in all cases where the gross annual income of the charity does not for the time being exceed 30*l*.⁷

Burial Acts.—By the Burial Acts, the burial boards thereby constituted, with the approval of the vestry, and of the guardians of the poor (if any,) and of the Poor Law Board, may appropriate, for the purposes of a burial ground, any lands vested in any persons as trustees for the general benefit of the parish, or for any specific charity; but when such lands are subject to any charitable use, they are to be taken on such conditions only as the Court of Chancery, in the exercise of its jurisdiction over charitable trusts, shall appoint and direct.⁸

The sanction of the Charity Commissioners must be obtained to the application.⁹ The application is made by the petition or sum-

1 8 & 9 Vic. ch. 70, sec. 22.

2 *Ante*.

3 8 & 9 Vic. ch. 70, sec. 22.

4 *Re West Ham Charities*, 2 De G. & S. 218, 222: 12 Jur. 788.

5 *Ex parte Incumbent of Brompon*, 5 De G. & S. 626, 635; see form of order, *Saton*, 246.

6 *Re West Ham Charities*, *ubi sup.*; and as to the application of the Act, see *Attorney-General v. Love*, 23 Beav. 499: 3 Jur. N. S. 948.

7 13 & 19 Vic. ch. 124, ss. 10, 11.

8 16 & 16 Vic. ch. 85, sec. 20; extended to parishes not in the metropolis by 16 & 17 Vic. ch. 134.

9 *Ante. Re Watford Burial Board*, 2 Jur. N. S. 1045, V. C. W.

mons, in the manner before explained;¹ and be supported by evidence of the propriety of the application. The question of price is one circumstance which the Court will consider, in deciding on the application.²

Municipal Corporations Act.—By the Municipal Corporations Act, it is provided that, where municipal corporations, or any of the individual corporators, were, before the Act, trustees of property for charitable purposes, the persons who at the time of the passing of the Act were such trustees, should notwithstanding they ceased to hold office, continue to be such trustees until the first of August, 1836, or until Parliament should otherwise order, and should immediately thereupon cease so to be. It is, however, provided that if any vacancy should be occasioned among the charitable trustees for any borough before the said 1st of August, the Lord Chancellor, upon petition, in a summary way, should have power to appoint another trustee to supply such vacancy; and every person so appointed a trustee should be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and should then cease to be a trustee; and that, if Parliament should not otherwise direct, on or before the said 1st of August, 1836, the Lord Chancellor should make such orders as he should see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates.³ As Parliament has not otherwise directed, the powers conferred by the last provision upon the Lord Chancellor still continue.

The Act only applies to charitable trusts for purposes *dehors* the corporation.⁴ The right of nominating to a spiritual benefice,⁵ or to the mastership of a hospital, is within the Act.⁶

The jurisdiction under the Act is exercised upon petition. The petition ought to be presented under Sir Samuel Romilly's Act,⁷

¹ As to petitions and summonses, see *ante*.

² *Re Egham Burial Board*, 3 Jur. N. S. 956, V. C. W.

³ 5 & 6 Will. IV. ch. 70, sec. 71.

⁴ *Re Oxford Charities*, 3 M. & C. 239, 244; and see *Re Ludlow Charities*, *ib.* 262, 263; *Christ's Hospital v. Granger*, 16 Sim. 83, 102; *Attorney-General v. Newbury Corporation*, C. P. Coop. 72; *Attorney-General v. Corporation of Ludlow*, 2 Phil. 685; *Attorney-General v. Corporation of Exeter*, 2 De G. M. & G. 507; 17 Jur. 266.

⁵ *Re Shrewsbury School*, 1 M. & C. 632; *Re St. John's Hospital*, 3 McN. & G. 235.

⁶ *Ibid.*, *Re Huntington Charities*, 27 Beav. 214.

⁷ 52 Geo. III. c. 101, *ante*.

as well as the Municipal Corporation Act,¹ and the Attorney-General's fiat should be obtained to it.² The petition may be heard by a Vice-Chancellor;³ and no order for filling up vacancies in the number of trustees, will be made, unless the Court is satisfied that the existing number of trustees is practically insufficient, and occasions inconvenience.⁴

By "The Charitable Trusts Act, 1853," wherever the legal estate in any lands of which a body corporate, subject to the provisions of the 5 & 6 Will. IV. ch. 76, was a trustee for charitable purposes, has not, since that Act, been duly vested in the trustees appointed under its provisions, or their survivors, or otherwise lawfully disposed of by the body corporate, such legal estate shall, immediately after the 20th August, 1853,⁵ and without any conveyance thereof, vest in the trustees so appointed, or their survivors, according to the respective estates and interests therein, and subject to the charges, and upon the trusts then affecting the same; and upon the death, resignation, or removal of any of the trustees, and upon any appointment of new trustees, the legal estate in the same is to vest in the persons who, after such death, resignation, or removal, and appointment of new trustees, shall be the trustees for the time being, without any conveyance or assurance whatever.⁶

Charitable Uses Acts.—In connection with the subject of charities it may be mentioned, that whenever the Court is satisfied by affidavit or otherwise, that the original deed creating a charitable trust has been lost or destroyed by time or accident, but that the trusts thereof sufficiently appear by some subsequent deed appointing new trustees, or otherwise reciting the trusts created by the original deed, it may, on the application by summons, in a summary way, of any trustee or other person interested in such charitable trust, make an order, authorising the enrolment of such subsequent deed; and the enrolment thereof will have the same

1 5 & 6 Will. IV. ch. 76.

2 *Ante*; *Re Warwick Charities*, 1 Phil. 559.

3 *Re Northampton Charities*, 3 De G. M. & G. 179; *Re Gloucester Charities*, 10 Hare, App. 3.

4 *Re Worcester Charities*, 2 Phil. 284; and see *Re Gloucester Charities*, *ubi sup.*

5 Date of passing "The Charitable Trusts Act," 1853."

6 16 & 17 Vic. ch. 137, sec. 66.

force and effect as the enrolment of the original deed would have had if the same had not been lost or destroyed.¹

An application under this Act is made by a summons, in the form used for originating proceedings, and intituled in the matter of the particular trust, and of the Act; and a duplicate must be filed at the Record and Writ Clerks' Office, in the usual way.² The application must be supported by affidavit or other evidence to satisfy the Judge that the authority to enrol the deed ought to be given.

1 27 & 28 Vic. ch. 13, sec. 3. As to the enrolment of such deeds, see 9 Geo. II. ch. 36; 9 Geo. IV. ch. 86; 24 & 25 Vic. ch. 9; 25 & 26 Vic. ch. 17; 26 & 27 Vic. ch. 106; L. C. Conv., 481, *et seq.*; *Smith, Comp.* 283, *et seq.*

2 *Ante.*

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THE END.

Ex D.C.C.

1/26/17

